

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

UNITED STATES OF AMERICA

V.

CASE NO: 2:16-CR-94-wks-1

BRIAN FOLKS

STATUS CONFERENCE

BEFORE: HONORABLE WILLIAM K. SESSIONS, III
DISTRICT JUDGE

APPEARANCES: WILLIAM DARROW, AUSA
EMILY M. SAVNER, AUSA
MATTHEW T. GARDY, AUSA
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Representing the Government

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DATE: April 10, 2019

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1 CLERK: This is case number 16-94, United
2 States of America versus Brian Folks. The
3 government is present through Assistant United
4 States Attorneys William Darrow, Emily Savner
5 and Matthew Grady. The defendant is present in
6 the courtroom with his attorneys, Mark Kaplan
7 and Natasha Sen. The matter before the court is
8 a hearing on pending motions and for argument on
9 outstanding issues.

10 THE COURT: Okay. This is a hearing on the
11 pending motions, but prior to actually
12 addressing the motions, I think we should make
13 clear that these hearings and also the motions
14 and objections should be public, and I'm
15 interested to hear from the parties as to how to
16 make sure that there can be disclosure of the
17 motions and the responsive pleadings because
18 this, you know, this clearly should be public in
19 my view.

20 So Mr. Kaplan, I was thinking about the
21 motions that you filed. You included the names
22 of the various co-conspirators, women involved
23 in this particular case. Is there any objection
24 to removing the last names so that they cannot
25 be identified, leaving the first names, and then

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1 making those motions public?

2 MR. KAPLAN: No. None at all, Judge. If
3 the Court wants us to, we can refile them.

4 THE COURT: If you can redact those names
5 that would be, then you could, then those could
6 be public.

7 MR. KAPLAN: Here's one other, I do have
8 one other concern along those lines which is the
9 government continuously refers to their
10 witnesses as "victims."

11 THE COURT: We dealt with that, well, a
12 number of months ago.

13 MR. KAPLAN: I thought we did.

14 THE COURT: They at trial are not going to
15 be referring to them as victims.

16 MR. KAPLAN: Okay.

17 THE COURT: But I guess that's just an
18 identification.

19 MR. KAPLAN: We're going to have the
20 indictment redacted, too, in that respect.

21 THE COURT: Have the indictment redacted?

22 MR. KAPLAN: The indictment speaks about
23 the witnesses and the counts as victims.

24 THE COURT: Okay. We'll deal with that
25 because they're not going to refer to victims.

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1 All right. As we address these particular
2 motions, in light of the cavernous nature of
3 this courtroom, I wonder if counsel would
4 approach and speak from the podium as opposed to
5 in left field. Any objection to that?

6 MR. DARROW: That would be great. It's
7 hard to see you from way back here.

8 THE COURT: Right. That's true. All
9 right. So let's begin with the first motion in
10 limine. That's the Government's Motion in
11 Limine to Preclude the Introduction of
12 Inadmissible Evidence. That's Docket number
13 348. Who's going to -- okay. So it's
14 Mr. Grady.

15 MR. GRADY: Yes, good morning, your Honor.

16 THE COURT: Good morning.

17 MR. GRADY: Your Honor, the motion really
18 goes into two camps. One is those motions that
19 or those, information that results in
20 convictions which 609 governs, and then of
21 course anything that is not a conviction of
22 misconduct and certainly 608 would apply. And
23 the way that the government sees things, the
24 only felony within the convictions that we've
25 listed in the motion is just the voyeurism

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1 felony that is pertinent to Mandy.

2 THE COURT: But 609 talks about over one
3 year.

4 MR. GRADY: That's correct, your Honor, and
5 we've already, the government's view of all the
6 retail thefts, for example, those were all
7 misdemeanor retail thefts from the government's
8 review of the criminal records and --

9 THE COURT: So what was the maximum penalty
10 of the various retail thefts?

11 MR. GRADY: I think it was under a year,
12 your Honor. That's why we categorized them as
13 misdemeanor retail thefts.

14 THE COURT: Okay.

15 MR. GRADY: Certainly if they are felony
16 retail thefts, then that would be a different
17 analysis, and they would be admissible under
18 609, but in the government's view the only one
19 that is a felony is the voyeurism conviction for
20 Mandy, and under a voyeurism conviction just the
21 essential facts is what comes into play as far
22 as impeachment is concerned.

23 THE COURT: Okay. So in regard to the
24 retail thefts, you're saying that all the retail
25 thefts with regard to who you refer to as Victim

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1 B and Victim D.

2 MR. GRADY: That's correct, your Honor, and
3 also I believe Jasmine also has a retail theft
4 the government is tracking though those are all
5 misdemeanor retail thefts. So again, since
6 they're not felonies under 609, then they are,
7 and they're also not crimes of dishonesty under
8 609(a)(2), none of those are admissible for
9 impeachment purposes.

10 THE COURT: That was one question that I
11 had. The theft, the stealing is not a crime of
12 dishonesty?

13 MR. GRADY: Not under Estrada. Estrada
14 talks about larceny because that was the issue
15 in that case, and in Estrada they also cited to
16 Sellers which is a case out of the Eleventh
17 Circuit saying that shoplifting does not involve
18 dishonesty, and there's also other cases that we
19 cited to in our motion such as Glenn from the
20 Ninth Circuit which talks about how shoplifting
21 may be indicative of a lack of respect as to a
22 person or property but by itself is not
23 indicative of truthfulness.

24 And the other thing I would point out in
25 Estrada, they cited to a case Pagan here in the

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1 Second Circuit and in Pagan they again reiterate
2 that just stand-alone shoplifting where you're
3 just concealing an item and walking out does not
4 trigger anything involving truthfulness. It's
5 only if you make a false statement in connection
6 with stealing, then that certainly triggers an
7 impact of one's veracity. Because in Pagan the
8 person filled out a welfare application stating
9 that they were on welfare to get food stamps,
10 and of course, that was a false statement under
11 oath.

12 THE COURT: So these retail thefts did not
13 involve any false statements; is that correct?
14 Because what you're suggesting is that the court
15 would have to go back through each one of the
16 retail thefts to see if there were related to
17 that theft a false statement.

18 MR. GRADY: For a couple of them, your
19 Honor, as to Victim D, the government is
20 following that. In some of the retail thefts
21 the, for example, that victim was stopped and
22 provided a false name to law enforcement. Now,
23 that would certainly go to a witness's
24 truthfulness and so certainly that could come,
25 that could be questioned about on 608 because it

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1 does go to truthfulness, making a false
2 statement to a law enforcement officer. So
3 there's a couple instances where the person
4 might have been stopped by a loss prevention
5 officer on the way out of the store, and of
6 course, if there was any false information
7 given, that would certainly be a proper basis
8 for impeachment.

9 THE COURT: So the difficulty in my review
10 of your pleading is that I don't know if that in
11 fact involved cases in which the person who is
12 convicted of retail theft made those kinds of
13 oral statements. It would be helpful if you
14 went through those convictions, added whether or
15 not each of those convictions involved false
16 statements to law enforcement, in which case
17 under 608 they would be more relevant.

18 MR. GRADY: Right. Okay. Yes, your Honor.
19 I can certainly go ahead and re-go through that
20 list and identify those particulars for the
21 court to assist.

22 THE COURT: Okay. So there's a second
23 series of issues and that's related to arrests,
24 Mr. Grady.

25 MR. GRADY: Yes, your Honor. So again with

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1 the arrest, the fact of the arrest itself is not
2 the impeaching event. Arrest, again, by itself
3 without a conviction doesn't trigger 609 so 608
4 would apply, and of course the relevant fact is
5 not the arrest itself but the underlying
6 conduct. So looking at the underlying conduct a
7 lot of it involves drug possession, retail
8 theft, disorderly conduct, DUIs, receiving
9 stolen property, trespassing, these are all
10 offenses that do not go to witnesses'
11 truthfulness.

12 Now, the one exception being false
13 statements to law enforcement. That certainly
14 goes to truthfulness so that's a proper avenue
15 to impeach the witness under 608, but everything
16 else involving drug possession, again, goes to
17 truthfulness.

18 And the one point I would point out about
19 the defense pleading is the defense talked about
20 credibility. Credibility is not the word that's
21 used in Rule 608. 608 talks about truthfulness.
22 So again, the offenses have to go to the
23 witness's truthfulness and not credibility which
24 is a more broader notion. Specifically, you
25 have to provide that link between the

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1 nonconviction conduct and the witness's
2 truthfulness.

3 THE COURT: All right. So you are not
4 objecting to the use of retail theft if there
5 were false statements made to law enforcement
6 when they were stopped.

7 MR. GRADY: That's correct, your Honor.
8 That would be improper under 608 to go to the
9 witness's truthfulness certainly.

10 THE COURT: Okay, and you're objecting to
11 use of arrest unless it's for a particular false
12 statement which means false statement to a law
13 enforcement officer. You have no objection to
14 the admission of that?

15 MR. GRADY: That's correct, your Honor.
16 The final thing I would point out is just going
17 back to the voyeurism conviction with Mandy, it
18 seems like the defense wants to go into more
19 than the essential facts of the conviction, and
20 I would just point out that the witness, Mandy,
21 was not convicted of making false statements to
22 a law enforcement officer. So they talk about
23 how when confronted with the information that
24 the witness lied at first, but, again, there's
25 no conviction for lying to the police. So that

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1 fact has not been established beyond a
2 reasonable doubt.

3 So if you try to get beyond just the facts
4 of the conviction itself, you open up this
5 inquiry into matters that have not been resolved
6 and then you kind of, when the government may
7 have to try to rebut that and talk about was the
8 person forced to, you know, take these pictures
9 and provide them to the boyfriend. So, again,
10 that's the government's view and seems like what
11 the Second Circuit, majority of the Second
12 Circuit's take is this notion that has to be
13 limited to the essential facts of the
14 conviction, the date of the conviction and the
15 sentence imposed and nothing else.

16 THE COURT: So the next question is the
17 prostitution convictions.

18 MR. GRADY: Yes, your Honor.

19 THE COURT: Prior prostitution convictions
20 before the, this is May of 2015 to March of
21 2016, and you pointed out the Rivera case from
22 the Second Circuit which suggests that previous
23 convictions for prostitution are not relevant to
24 coercion; is that correct?

25 MR. GRADY: That's correct, your Honor. I

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1 would actually say two things. One is that
2 under 609 the prostitution arrests again are not
3 felonies. So if it's not a felony, then it has
4 to be a crime of criminal fallacy and of course
5 criminal and fallacy. So under 609 it's not
6 allowed proper impeachment --

7 THE COURT: 609 is to impeach. This is
8 relevant to the question of coercion. And if
9 somebody is engaged in prostitution
10 professionally before the conspiracy or this set
11 of facts happens, it would seem at first blush
12 that that's relevant to coercion. But Rivera
13 says no. Then it becomes, at least as I'm
14 thinking about this, becomes a little bit more
15 complicated when that person testifies, and
16 let's just say as an example that person says I
17 wasn't ever going to engage in prostitution but
18 then I was coerced by the defendant. Then that
19 opens up the door to the use of the previous
20 conviction, I would assume, because it confronts
21 the statement that the witness just made.

22 MR. GRADY: Sure. Your Honor, I don't know
23 if that's really going to come into play in this
24 case because as we pointed out in our 412
25 response, the witnesses, majority of witnesses

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1 if they engaged in prior prostitution and that's
2 how they met the defendant they will certainly
3 admit at least in preparation that yes, I met
4 the defendant through prior prostitution. That
5 provides context to the jury, but what 412 and
6 Rivera state is the defense cannot then argue to
7 the injury that okay, because Victim A prior
8 prostituted that means that she consented to
9 prostituting for the defendant because those are
10 two separate inquiries. Prior prostitution has
11 nothing to do with whether the defendant used
12 coercion to compel the victim to engage
13 prostitution for purposes of this case and
14 that's what --

15 THE COURT: But so that means that you have
16 no objection to a discussion about the fact that
17 she engaged in, let's say, prior prostitution.
18 I thought you were saying well, of course they
19 should be able to get in the Backpage because
20 that's how the defendant met some of these
21 women. They advertised on Backpage. You had no
22 objection to that to explain the nature of the
23 relationship, but that would necessarily bleed
24 into the fact that they engaged in prior
25 prostitution. You have no objection to that.

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1 All you object to is the defense arguing that
2 because they were engaged in prostitution before
3 that does not prove or is in fact irrelevant to
4 the question of coercion.

5 MR. GRADY: That's exactly right, your
6 Honor, and we believe that's a reasonable middle
7 ground because it provides some context to the
8 jury about how a particular witness or victim
9 met the defendant, and then again with Rivera in
10 412 foreclosed making the argument you just
11 pointed out to the jury. So that's how the
12 government sees things.

13 THE COURT: Okay. All right. Arrest for
14 false pretenses? Prostitution and voyeurism
15 you've addressed. Anything else?

16 MR. GRADY: Nothing further from the
17 government, your Honor. Thank you.

18 THE COURT: All right. Who wants to
19 respond for the defense? Ms. Sen?

20 MS. SEN: Yes. Your Honor, I would just
21 point out that in Second Circuit case, Estrada,
22 one of the examples that it gives of the kinds
23 of convictions that you are supposed to look at
24 under the first part of 609 for truthfulness on
25 the, even though it's not a criminal fallacy

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1 crime, but it mentions specifically theft. So
2 the idea that the government is suggesting that
3 retail theft, unless it involves some kind of
4 false statement to a police officer in the
5 course of that conviction is not probative of
6 truthfulness or dishonesty, it seems to be
7 contrary to Second Circuit law.

8 THE COURT: So what, you just heard the
9 government acknowledging that if there's any
10 false statement made to law enforcement as the
11 person was arrested for retail theft, then that
12 clearly can be admitted under 608, right? So I
13 didn't see in the pleadings those particular
14 instances of false statements to law enforcement
15 at the time of the arrest. That's refusal to
16 identify who they were or using false names or
17 anything of that sort. Do you have those
18 identified?

19 MS. SEN: Your Honor, we are still
20 receiving the criminal history convictions of
21 these witnesses. So as we go through them --
22 we're only going to bring to the court one set
23 that involves dishonesty anyway. We're not
24 interested in, you know, if someone is convicted
25 for shoplifting. I mean, unless there's an

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1 argument that it goes to their credibility, I
2 mean we will be looking at that certainly, but I
3 think the idea that somehow theft is not a crime
4 of dishonesty, I'm not sure that the Second
5 Circuit would necessarily agree with that.

6 THE COURT: But you're not going to bring
7 retail thefts unless there was a false
8 statement; is that correct?

9 MS. SEN: Well, I think the law is a little
10 bit unclear. I don't think we have to show that
11 this is necessarily -- I think we have to look
12 at the context and the actual facts of each of
13 those convictions, your Honor, is what I'm
14 saying is that the court needs to look at and do
15 the 403 balancing test. So if we bring a
16 conviction and we argue it is indicative of the
17 circumstances surrounding it showed that this
18 person engaged in dishonest behavior, you know,
19 some kind of, I can't think of anything right
20 off the top of my head, but some kind of, you
21 know, ruse situation in a store to steal
22 something, I think then it would sort of go to
23 that person's level of honesty or dishonesty.

24 THE COURT: All right. So the court is
25 going to reserve judgment on the retail theft

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1 because you've got more to introduce, and there
2 seems to be a consensus that if the theft was
3 accompanied with false statements to law
4 enforcement, then it would be relevant and
5 admissible.

6 All right. So the arrests in general. Is
7 there any arrest that you seek to introduce
8 without a conviction --

9 MS. SEN: Well, I think --

10 THE COURT: -- under 608?

11 MS. SEN: I apologize, your Honor. I think
12 an arrest that one of the witnesses has for
13 false pretenses, I think that that would be
14 relevant. I think that involves dishonesty. I
15 also think, again, looking at the specific
16 circumstances with respect to arrests for things
17 like theft again, depending on the
18 circumstances. I mean, I think that this is
19 something that we're going to have to raise with
20 the court at the time that we wish to use them
21 to impeach and that, if it looked to us like the
22 facts show that it involves an element of
23 dishonesty, we could ask the court to be able to
24 use it.

25 THE COURT: All right. So if I reserve

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1 judgment, you can't bring this up in opening
2 statement. You're going to use false presences
3 arrest, right?

4 MS. SEN: Yes.

5 THE COURT: You understand that?

6 MS. SEN: Yes, of course.

7 THE COURT: We'll reserve judgment on that.
8 What about the prostitution convictions?

9 MS. SEN: Well, in terms of, if a witness
10 were to get on the stand and talk about how the
11 only, that they only prostituted because of my
12 client and that they didn't prostitute before
13 and they didn't prostitute after, but it's clear
14 at least one of these witnesses has a later,
15 later convictions for prostitution, I think that
16 that would be relevant for purposes of
17 impeachment. Because --

18 THE COURT: Right. So if the witness lies,
19 you want to use the convictions to show she
20 lies, not, that's not relevant to coercion,
21 that's use for impeachment, probably the
22 government would not object to that. All right?

23 But how about the use of prostitution
24 conviction on questions of coercion.

25 MS. SEN: Well, I wasn't quite

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1 understanding the government's argument on that
2 point. I understand that under Rivera the
3 conviction just can't come in to argue, to say
4 that this person, as evidence of not being
5 coerced, but I think that we can argue based on
6 the evidence whatever the evidence shows which
7 is this person was coerced or wasn't coerced.
8 You know, to me those cases really go to the
9 technical issue of whether or not the conviction
10 comes in, but, for example, if it were to come
11 in on some other evidentiary ground which is
12 admissible, then I don't see why the defense
13 wouldn't be able to argue it. I mean, the
14 government seems to say that even, that you
15 can't even make the argument.

16 THE COURT: If the conviction comes in to
17 impeach, you cannot argue that that conviction
18 was for a different purpose like to rebut
19 coercion. It's only being introduced for
20 impeachment so you're restricted in that regard.
21 So the really clear question is whether a
22 conviction for prostitution, prior prostitution,
23 not post the offense, but prior prostitution is
24 relevant to coercion.

25 MS. SEN: I would say under these

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1 circumstances I'm not aware of that issue coming
2 up. I don't think that any of these witnesses
3 have prior convictions for prostitution. I
4 think that most of them who are engaged in prior
5 prostitution, and I'm speaking just very
6 specifically about the named witnesses in the
7 indictment, and Mr. Kaplan may want to correct
8 me, but I believe that all of them have admitted
9 to being involved in prior prostitution. So I
10 don't see this necessarily as an issue coming
11 up, but can I just consult with counsel for a
12 moment, your Honor, and get back to you?

13 THE COURT: Sure.

14 MS. SEN: If there are other issues you
15 wanted me to address and then --

16 THE COURT: No. That in particular. So
17 the question is whether that's to be used to
18 rebut coercion, and maybe I'm mistaken, but I
19 thought that there were a couple of convictions
20 of some of these witnesses prior to this series
21 of acts.

22 MS. SEN: That's why I don't want to
23 misspeak, your Honor, so let me just check with
24 Mr. Kaplan. He might be able to answer that
25 better than I can.

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1 THE COURT: You want to do that now?

2 MS. SEN: If that's okay, your Honor.

3 THE COURT: Sure.

4 MS. SEN: Your Honor, I think that in
5 consulting with Mr. Kaplan it does appear that
6 another witness may have some prior convictions,
7 but I think that we would do what the laws
8 required, and under Rivera it doesn't look like
9 we would be able to argue that that was --

10 THE COURT: Okay. Let's now go to the
11 broader question. Let's just assume that one of
12 the women who is going to testify met the
13 defendant on Backpage, prior to that was engaged
14 in prostitution. Can you introduce that? Do
15 you intend to introduce the fact that she was
16 engaged in prostitution prior to meeting the
17 defendant?

18 MS. SEN: Well, I think that we would show,
19 and my understanding is that the government
20 wouldn't disagree with us, that the way our
21 client met this witness was via her Backpage ad.

22 THE COURT: Correct.

23 MS. SEN: So I think that it implies that
24 she was involved in prostitution in one way or
25 the other. I don't know that we would get into,

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1 I think the law limits us into going much beyond
2 that. So I think that it would be --

3 THE COURT: Well, can you say, can you
4 question her about being engaged in prior
5 prostitution? I mean, the government has
6 conceded that you can bring out the Backpage.
7 She's advertising on the Backpage. That's how
8 she met the defendant. Clearly, that's
9 relevant, but can you question her about being
10 engaged in prior prostitution?

11 MS. SEN: I think under the law, I think
12 under Rivera, I think the government is right on
13 that. I don't think that would come up.

14 THE COURT: Okay. All right. Is there
15 anything else that you want to address on 349 or
16 348?

17 MS. SEN: No, your Honor.

18 THE COURT: Okay. All right. Can I get
19 the government's response to that hypothetical?
20 Let's just say one of the witnesses testifies
21 that they, that she met the defendant by way of
22 the Backpage advertisement. She obviously was
23 engaged in prostitution. Sort of obvious. Can
24 they question her about, you were involved in
25 prostitution. Can they ask the question?

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1 MR. GRADY: No, your Honor. Excuse me,
2 your Honor. Under 412 and Rivera, any questions
3 as far as how long were you involved in
4 prostitution, how many clients did you see, what
5 specific acts did you do, all of this could
6 provide, you know, days, hours' worth of
7 testimony that is prohibited under 412, and I
8 think the government is reasonably coming to the
9 middle ground why it can provide context for how
10 a particular witness or victim met the
11 defendant, but 412 and Rivera bars any inquiry
12 into prior acts, and we would ask the court, and
13 I think it sounds like the defense will abide by
14 Rivera and not go into that tangential
15 information that is precluded by 412 and Rivera.

16 MR. KAPLAN: Judge, could I comment on
17 that?

18 THE COURT: Sure.

19 MR. KAPLAN: I think it's an issue that I
20 was going to address anyway, but I think it
21 depends on the context. In other words, I don't
22 think you can question someone who was involved
23 in prostitution just because they were involved
24 in prostitution, sort of out of context with the
25 case, but, for example, there's one witness in

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1 this case who was working as a prostitute for a
2 group of guys and Brian was helping out with
3 that endeavor because they asked him to, and
4 then one of the witnesses decided that she'd
5 much rather work with Brian than work with these
6 other guys, and she came to him and said look,
7 I'd like to have you help me out. I don't want
8 to deal with these people anymore. I think you
9 can talk about what she was doing and how long
10 she was doing it and how Brian met her in that
11 context but not arguing that because she was a
12 prostitute before means so wasn't coerced later
13 on.

14 THE COURT: So what you're trying to do is
15 take the government's lead and say you can talk
16 about prior prostitution or prior Backpage ads
17 to put context to the meeting between this
18 person and the defendant, and in that particular
19 context, she would have to say that she was
20 engaged in prostitution, she was being managed
21 by other individuals, and that for one reason or
22 another she engaged with the defendant.

23 MR. KAPLAN: It's a little more involved,
24 but it also follows the same path that the
25 government has agreed to which is it gives

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1 context. I think the government misinterpreted
2 what our intention was when we mentioned that
3 particular witness. It wasn't to show because
4 she was a prostitute she wasn't forced by our
5 client. It was to show that while she was
6 working as a prostitute, she voluntarily asked
7 him to help her out.

8 THE COURT: Mr. Grady, do you want to
9 respond to that?

10 MR. GRADY: Yes, your Honor.

11 THE COURT: You may have a different
12 version of the facts, but assuming that that's
13 what they want to show, that is that she was
14 working with these other guys and she preferred
15 working for him which goes right directly to the
16 issue of coercion, wouldn't they be able to do
17 that?

18 MR. GRADY: Your Honor, there's a couple
19 things I'd like to point out. Number one, in
20 the defense notice and what they just said here
21 in court, the witness has a slightly different
22 take on the facts as far as the buildup to
23 meeting the defendant. So I think what the
24 defense just mentioned may not be what the
25 witness is going to testify to. So I think,

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1 number one, we have a factual dispute as far as
2 the context is concerned.

3 THE COURT: Can you tell us what the
4 witness is going to say?

5 MR. GRADY: Sure. I mean, essentially she
6 will say, talk about that she was on Backpage
7 working for another individual and that she met
8 the defendant and then began essentially working
9 for him for a variety of reasons that she can
10 talk about, but I don't think --

11 THE COURT: Were some of those reasons her
12 antagonism toward previous persons who managed
13 her prostitution?

14 MR. GRADY: Not necessarily, your Honor.
15 Some of it goes to the defendant having better
16 quality of drugs that she provided and better
17 access to drugs than a previous supplier or
18 person that was helping her on Backpage.

19 THE COURT: But it's pretty clear that she
20 would have to acknowledge, if you're the
21 witness, that you were engaged in prostitution
22 if they're going from one manager to another
23 because the reasons why you're going from one
24 person to the other is essentially very
25 relevant, and that's relevant to coercion. So

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1 that is coming out.

2 MR. GRADY: Yes, your Honor. The
3 government will bring that out on direct, and I
4 think that will provide the necessary context
5 certainly to explain to the jury, but what seems
6 like the defense is putting forth is like, well,
7 we need to know exactly how many weeks, days,
8 months did you go with these three, group of
9 guys, and how exactly did they treat you, what
10 acts did you do, how is it different with my
11 client. All of the pre-information they're
12 talking about is in our view barred by Rivera
13 and 412. We will give that context to the jury
14 to understand how they met the defendant, but
15 certainly everything else should be barred under
16 412 and Rivera.

17 THE COURT: Well, yeah, but when you also
18 ask the witness to explain why you moved from
19 one person to the defendant, that opens up the
20 door for them to explore what was it like with
21 this other person, and is this truthful, is this
22 accurate, et cetera. So anyway. At this
23 particular point there's clearly going to be an
24 acknowledgment that this witness engaged in
25 prostitution.

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1 MR. GRADY: Yes, your Honor. The
2 government was concerned because in their 412
3 notice for this particular witness, they also
4 stated not only for context but to counter the
5 government's assertion that the defendant forced
6 her into coercion. That's why the government
7 was concerned because that second part, that
8 argument is foreclosed by Rivera.

9 THE COURT: Okay. All right. Next is 349.
10 Government's Motion for Reconsideration of 202,
11 and that's the mention of the Bloods.

12 MR. GRADY: Yes, your Honor.

13 THE COURT: I guess first is it true that
14 there's only one of the witnesses who would
15 refer to the defense as a member of the Bloods?

16 MR. GRADY: Yes and no, your Honor. Yes in
17 that for Victim C she's the only one that was
18 very impacted by the alleged membership in the
19 Bloods. There's other victims that were aware
20 of it, they heard it, but it wasn't a big impact
21 on them. So we do not intend to draw it out.
22 There may be an additional witness such as Mandy
23 or other drug runners who heard or may have been
24 impacted a little bit by the alleged gang
25 membership status, but as it applies to the

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1 charged victims, it is correct that Victim C is
2 the only one who will talk about it in much
3 detail because, again, it impacted her decision
4 as she drove down to the NorthStar for the one
5 week that she was with the defendant.

6 THE COURT: How about the spillover
7 problem? Once you allow Victim C, you refer to
8 her as Victim C, to be examined on the fact that
9 she was aware that he was a member of the Bloods
10 and she was frightened by that, that fact, the
11 fact that he was a member of the Bloods becomes
12 relevant not just to Victim C but to everybody
13 else. And don't you have enough evidence
14 otherwise to show fear so that membership in the
15 Bloods becomes that much less crucial?

16 MR. GRADY: Your Honor, I would say two
17 things. One as to for any spillover effect, I
18 believe that can be quite appropriately handled
19 by a limiting instruction or curative
20 instruction to direct the jury that they can
21 only consider the evidence as it relates to
22 Victim C and how it relates to the statute where
23 it essentially asks them to step into the shoes
24 of a reasonable person of a victim's background
25 to assess everything --

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1 THE COURT: So how does that instruction
2 go? The instruction would say to the jury,
3 you're allowed to consider the fact that he may
4 be a member of the Bloods in regard to what
5 Victim C is saying, but you're not allowed to
6 think about the fact that he was alleged to be a
7 member of the Bloods in regard to all of the
8 other victims. You're asking a jury to do
9 somewhat of an impossible feat, aren't you?

10 MR. GRADY: Not necessarily, your Honor.
11 We presume that the jury has listened and
12 followed the instructions, and, again, it's not
13 as if the government is trying to prove that he
14 is a gang member or has status. This comes
15 solely from the defendant's statements to Victim
16 C. So as opposed to the Lockhart case when the
17 government established expert testimony that the
18 defendant was a confirmed member of the Folk
19 Nation gang, certainly the evidence is less
20 prejudicial than what's been used in other sex
21 trafficking cases. So we believe under the
22 circumstances because it's coming from the
23 defendant's own mouth as opposed to photos
24 showing gang symbols or things of that nature
25 that that's why it has relevance as to how it

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1 impacted Victim C.

2 In answer to your other question of don't
3 we think that we have enough, ultimately that's
4 the jury's consideration, and for this
5 particular victim, she was only there for a
6 week, there was no actual physical force, the
7 gang membership was certainly a factor, and,
8 again, the jury is going to be asked to consider
9 a reasonable person in her shoes whether this,
10 whether it's reasonable for her to fear him, and
11 certainly this is part of the story and big part
12 of her story and so to take that out is you're
13 taking out a piece of what the government
14 believes is crucial to its coercion argument as
15 to that victim, and certainly the jury may still
16 decide, but it's for the jury to decide and not
17 certainly us.

18 THE COURT: But this is 403 analysis.

19 MR. GRADY: Sure.

20 THE COURT: And when you're talking about
21 spillover effect you're talking about the impact
22 upon all of the other persons who may not have
23 known that he was a member of the Bloods, but
24 that scenario that he's a member of the Bloods
25 is really prejudicial.

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1 MR. GRADY: But, your Honor, it's more
2 probative than it is prejudicial, and I think
3 any concerns can be addressed in the spillover
4 effect, particularly because other victims that
5 were aware of it, for example, Victim D was
6 aware of the defendant's gang status, but it had
7 no impact on her. So the government does not
8 intend on drawing that out and asking
9 unnecessary questions about it, because it
10 really is only probative as it relates to Victim
11 C and that car ride down, and particularly under
12 the circumstances of her owing a drug debt to
13 another reported gang member, and I think
14 Gardner in the Sixth Circuit opinion is correct
15 when it points out that it's important to the
16 1591 analysis because it shows or is some
17 evidence that the victim reasonably believed the
18 person was the kind of person who could hurt her
19 because of his alleged gang membership.

20 THE COURT: But you're going to get the
21 rest of the conversation in, aren't you? The
22 conversation between the defendant and the
23 Victim C in regard to the drug debt and in
24 regard to all of the other statements that he
25 made, aside from his affiliation in the Bloods

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1 which you argue is quite threatening.

2 MR. GRADY: Yes, your Honor, and it's a big
3 piece of the coercion piece. Certainly we can
4 talk about the drug debt and maybe how the
5 defendant had a firearm, but a lot of the fear
6 was based upon the fact that I owe this drug
7 debt and now this person, you just told me that
8 you're supposedly a gang member and this person
9 I owe money to is also a gang member, it ramps
10 up that fear in the victim's mind, and that
11 certainly is reasonable under the circumstances
12 of a person in her position, and we're just
13 trying to convey that to the jury as to why she
14 felt compelled to prostitute for the defendant
15 knowing that he never put a firearm to her head
16 or never slapped her or punched or kicked her or
17 threatened that sort of physical violence.

18 So it's an important part of the story the
19 government believes to prove coercion, and we
20 just pointed out Lockhart and Gardner as other
21 cases where the Sixth Circuit and the Fifth
22 Circuit allow this type of information in saying
23 it's proper under the 403 balance, and that it
24 was necessary given the unique circumstances of
25 what the government has to prove in --

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1 THE COURT: And in those cases, were there
2 a whole series of other persons in the same
3 position as this Victim C so that the spillover
4 effect of the mentioning of the gang affiliation
5 became that much more significant?

6 MR. GRADY: So for Gardner, I would say no.
7 For Lockhart, yes. Gardner from the
8 government's view was a single victim indictment
9 and so it was only the victim who testified
10 about her fear of the defendant based upon the
11 gang status, but in Lockhart that was four
12 different defendants, there was multiple
13 victims, there was expert testimony produced
14 that all four defendants are gang members. So
15 presumably there would be more victims and there
16 would be more of a spillover concern for the
17 court to face that particular prosecution.

18 THE COURT: Okay. Okay. All right. Thank
19 you. Someone want to respond to that?

20 MR. KAPLAN: Thank you, Judge. I think the
21 court's already touched on our major concerns.
22 Obviously, the major one is the spillover
23 effect. People, the court has mentioned this
24 before. People associate gang members with
25 violence and threats, drug dealing, use of

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1 firearms. I mean, whatever you can think of in
2 terms of violence, people associate that with
3 gang members. And I think, apparently there's
4 going to be evidence introduced in this case
5 that suggests our client was involved in
6 threatening behavior, violence, possessed
7 firearms. The fact that the jury knows that
8 he's a gang member is going to really taint, I
9 think, their ability to assess that evidence
10 fairly, and I don't see any way to cure that. I
11 don't see how an instruction will cure --

12 THE COURT: Well, the fact that in voir
13 dire you would have to ask about there may be
14 evidence that the defendant was a member of the
15 Bloods because you need to know whether that
16 fact alone would impact their judgment. It
17 opens up a real risk, it seems to me, and if
18 there's sufficient ways for the government to
19 actually show coercion in regard to Victim C so
20 that they're not being hampered significantly,
21 the risk of mentioning the Bloods should be
22 avoided.

23 MR. KAPLAN: I agree, and I think the court
24 already touched on this other aspect which is I
25 think it's really a minor part of the case when

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1 you weigh in comparison the negative effect that
2 it would have on the defense. There's only one
3 witness that is saying that. And frankly, I
4 could give the court a little more context which
5 is I just don't think it's true. I mean, if you
6 look at her statement, subsequent to when she
7 says she was forced to become a prostitute, it's
8 clear that she's not afraid of my client, she's
9 not worried about him being a Blood. I have
10 Facebook emails that go from July of 2015 to
11 September of 2015 where she's constantly
12 communicating with my client. At one point on
13 July 19th of 2015 she's writes to my client and
14 he writes to her and says I'd like to talk to
15 you and she says what do you want. He says I
16 need a ride. I'd like to pay someone \$20 to
17 give me a ride to Wal-Mart. She said sure, I'd
18 be happy to do that, and there's numerous
19 conversations like that, and then in September
20 of 2015 she emails my client and says I'd like
21 to come back and work with you tomorrow.

22 So I'm just saying when you look at the
23 entire picture with respect to this particular
24 witness, it doesn't, it's not really a credible
25 claim on her part, there's no evidence that it

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1 impacted her and nothing was said at the time to
2 suggest that she had these fears. Everything
3 she did subsequent to that suggested that she
4 didn't have those fears.

5 So I think you weigh all that against the
6 negative impact, and it should not be --

7 THE COURT: All right. I'm going to deny
8 the Motion for Reconsideration. I think the
9 spillover effect, frankly, is dramatic. That
10 once membership in the Bloods is introduced, no
11 reasonable jury is going to limit that to this
12 one particular person, and I think there's, you
13 know, adequate other opportunities for the
14 government to show coercion which are much more
15 reliable than just membership in a gang. I
16 think it's extraordinarily prejudicial, and
17 under 403 I'd exclude it.

18 Now, 350. Government Proffer on Issues yet
19 to be Decided.

20 MS. SAVNER: Good morning, your Honor. I
21 don't know if you want to take these one by one
22 or --

23 THE COURT: One by one is fine.

24 MS. SAVNER: Okay. So in terms of sort of
25 general overview, all of these specific pieces

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1 of evidence that the defense has sought to
2 exclude fit into various ways into the
3 government's theory of the case and allegations
4 that the defendant used various means of
5 coercion to compel these young women to
6 prostitute for him. So as explained in the
7 briefing, you know, the type of coercion and his
8 scheme of coercion ranged from acting in a
9 controlling manner, asserting his physical
10 dominance over the women by requiring them to
11 have sex with him as part of the conditions of
12 their employment. It included controlling their
13 drug supply and manipulating their drug supply
14 so that they became dependent and more dependent
15 on him for the drugs they needed to avoid the
16 painful symptoms of heroin withdrawal.

17 His scheme of coercion also included the
18 implicit and explicit threat of reputational
19 harm. The defendant had a library of
20 photographs and videos on each of the women he
21 prostituted, and the women knew that because
22 they were present when he was taking all these
23 videos and filming them.

24 THE COURT: And you have one example of his
25 use of this series of videos or photographs that

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1 was used to destroy reputational harm? Or
2 destroy reputation. Yes, destroy reputation?

3 MS. SAVNER: Yes, there is one video that
4 he published that's of minor Victim E after she
5 did something that in his words violated him,
6 but so there's that one example of him carrying
7 the threat out, but the threat was existent
8 among all of the women even before this video
9 came out.

10 THE COURT: And the women would verbally
11 testify to that threat?

12 MS. SAVNER: Yes, your Honor.

13 THE COURT: That if in fact you steal
14 drugs, I think that was the minor victim, but if
15 you in fact violate his rules, then he will use
16 these videos or these photographs to embarrass
17 them.

18 MS. SAVNER: I can't speak for all of the
19 victims but for some of them certainly, and if I
20 can find the spot in the filing, Victim B said
21 that explicitly and she's testified to it in her
22 grand jury testimony that, you know, she knew he
23 had this library of material on him, and it was
24 a sort of constant refrain of the defendant that
25 if you violate me, I'll violate you back, and

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1 that could have meant many things and did mean
2 many things to the witnesses and the victims,
3 one of which was this threat of exposing them to
4 their friends and families who often did not
5 know that they were engaged in prostitution or
6 even heroin use.

7 THE COURT: So that's the general
8 background. That's how you're going to prove
9 coercion. There's specific issues that have
10 been raised in the pleadings, and the first is
11 any evidence alleging that the defendant
12 sexually assaulted ML in July of 2016. July is,
13 of course, after the period of time for which
14 the defendant is charged. Are you suggesting
15 that this is related in any way to this "I'll
16 get back at you" or -- and how is this relevant?

17 MS. SAVNER: Yeah, I mean, I think it is
18 directly relevant to the "I'll get back at you"
19 sentiment that he put out to all the women that
20 worked for him, both in his drug business and in
21 his prostitution business. When the defendant
22 learned that this woman, listed as ML, had taken
23 up with another man, he was angry about it and
24 told her he would violate her, and then he did
25 in fact carry out that threat to violate her by

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1 coming to her house and sexually assaulting her.

2 THE COURT: Okay. By this point, all of
3 the criminal acts that are subject to the
4 indictment have been over.

5 MS. SAVNER: Yes, your Honor.

6 THE COURT: And this is in response to her
7 deciding to go with another man?

8 MS. SAVNER: Yes, your Honor.

9 THE COURT: Okay. All right. The next one
10 is evidence related to the shooting of people
11 allegedly associated with the defendant in New
12 York City.

13 MS. SAVNER: Yes. So as with the evidence
14 related to the defendant's quote, unquote,
15 murder of someone, this evidence, information
16 that the defendant had shot people, that he'd
17 been convicted of manslaughter which he himself
18 referred to as murder was part of the climate of
19 fear that the defendant created. This implicit
20 threat of force. That if they did not follow
21 his rules, if they did not prostitute for him,
22 if they didn't go out on the next date that he
23 wouldn't hesitate to use force against them, and
24 that was playing into multiple of the victims'
25 minds when they were faced with the choice of

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1 whether to continue prostituting or not.

2 THE COURT: So he would say to these women,
3 I've been convicted of murder? What's the
4 proffer as to what he actually said to them?

5 MS. SAVNER: Yes, so --

6 THE COURT: And then the results, what
7 impact it has.

8 MS. SAVNER: So some of the witnesses will
9 testify that they knew he had been previously
10 convicted of homicide.

11 THE COURT: How would they know that? I
12 mean, would he have said that? Or is it the
13 rumor out there that he was convicted of murder
14 in New York State. I mean, obviously if he said
15 that, it's a higher relevance because that's a
16 direct indication that he is coercing through
17 that statement or if it's just, did you know by
18 reputation that he had been convicted of murder
19 in New York, that's of less value, although you
20 would still say that's relevant.

21 MS. SAVNER: Well, yes, your Honor. It
22 relates, I think, most specifically to Victim B.
23 There was an incident where Victim B stole some
24 heroin from one of the defendant's drug runners,
25 and the defendant found out and brought her in,

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1 put out a bounty on her and brought her in, and
2 on page 10 of the filing and in her grand jury
3 testimony she talks about her fear in those
4 moments and what specifically she was afraid of,
5 what would happen to her, and she says, "and I
6 did know what he was capable of because I did
7 like I knew he went to jail for murder. Like he
8 was expedited back to New York for a murder
9 charge like a while back. So it just made me
10 really nervous."

11 THE COURT: So how does she know that?

12 MS. SAVNER: Well, he was, if I understand
13 his criminal history correctly, he was
14 incarcerated for a parole/probation violation on
15 the homicide charge while he was sort of in
16 Victim B's orbit so she was aware that he left
17 Vermont and was back in jail for a period of
18 time in 2013.

19 THE COURT: But I guess the more direct
20 question is did he say that or did she hear that
21 from others.

22 MS. SAVNER: I don't know how she knew he
23 was taken back to jail.

24 THE COURT: Okay. So these are the kind of
25 things that obviously you need to explore. If

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1 he's making representation that he was convicted
2 and he is using the fact that he was convicted
3 of a homicide as a level of coercion, then
4 that's clearly relevant and highly probative.

5 If on the other hand, this is learned from
6 these witnesses by hearsay or just by
7 reputation, that becomes a little less
8 probative. So I think probably the issue of
9 whether you could use this conviction should
10 await factual exploration. Would you agree with
11 that?

12 MS. SAVNER: Yes, your Honor. We don't
13 object to letting the witnesses explain how they
14 came to learn of the information and going from
15 there.

16 THE COURT: All right. Evidence related to
17 the walnut challenge. Apparently, there are two
18 videos --

19 MS. SAVNER: Yes, your Honor.

20 THE COURT: -- of the walnut challenge. Do
21 you seek to introduce those videos?

22 MS. SAVNER: We do, and I'd like to make it
23 clear that those videos while they discuss the
24 challenge that's about to take place organized
25 by the defendant wherein various of the women

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1 involved in his prostitution enterprise,
2 including two of the named victims, were to have
3 a contest to see how many walnuts could be
4 inserted into their anuses. So that was the
5 nature of the contest, and that's what's sort of
6 discussed in the portions of the video that the
7 government seeks to introduce. The videos that
8 the government has that it recovered from the
9 defendant's computer do not actually show the
10 act of the contest itself. Just sort of
11 discussing it and it shows the defendant in the
12 second video sort of preparing one of the women
13 who worked for him as a prostitute for the
14 contest.

15 THE COURT: So in reading both pleadings
16 from the defense and from the government, I sort
17 of came to the conclusion that you must have
18 looked at different videos. You use the video
19 as coercion, that you are demeaning women in
20 this particular way. The defense has said that
21 there were a number of people there, and other
22 people just said I don't want to participate in
23 this, and that was fine. So I don't know what
24 it is. Is it evidence of really threats or
25 coercion or is it demeaning? Clearly, it's

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1 demeaning. But then the defense says everybody
2 else said no, I don't want to participate in
3 this, and they were allowed to do that. Is that
4 what happened on the video?

5 MS. SAVNER: So based on my recollection,
6 there are two other women present in the house
7 who can be seen in the video who are approached
8 by the defendant or his associates and say, you
9 know, can we get you in there, can we get you to
10 do this, and one of them will testify to that
11 fact that she was approached about participating
12 in the video and she said no. I will note that
13 these two women were not prostituting for the
14 defendant at the time, based on the government's
15 knowledge. They are not charged victims and
16 coercion as to them is irrelevant. The fact
17 that the draw of participation which was getting
18 a few tickets of heroin in exchange for
19 participating was coercive, had a coercive
20 effect for the women that did participate, and
21 particularly two of the charged victims, I think
22 is highly relevant.

23 In addition to that is the fact that once
24 it was done, this video, the women believed this
25 video existed of them, and again, that's another

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1 thing that Victim B talks about is leading to
2 her fear of reputational harm that this video
3 could be exposed.

4 THE COURT: Did he ever threaten subsequent
5 to this video using the video in this kind of
6 intimidating way?

7 MS. SAVNER: I don't believe he did so
8 explicitly, but as Victim B notes in her, she
9 explains in her grand jury testimony, you know,
10 the question was why were you concerned for
11 yourself that he had these pictures of you, and
12 she responds, "because if he got mad at me or if
13 I didn't go meet up with him, I'm sure he would
14 have done the same thing to me to get back at
15 me, knowing that everything I did I kept private
16 and I didn't want my family and friends to know
17 about." And the question is, "Is this one of
18 the ways he was able to control you." Answer,
19 "In a way, yes. Like he's never personally ever
20 said this is what I'll do to you, but I knew he
21 had multiple pictures, dozens and dozens of
22 pictures of me, since I was young young, like
23 really young. He had taken that video of me,"
24 and that's referring to the walnut video, "and
25 for him just me knowing that he had this video

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1 like he could do anything with it."

2 So for that witness who will testify that
3 her experience participating in this challenge
4 was highly traumatizing to her. In fact, she is
5 a witness who will say that after the defendant
6 filmed her participation in the contest that the
7 defendant told her I can't use this video. It
8 looks too much like rape. That's how miserable
9 and unhappy she was while she was participating
10 in it. And the fact that he then had that video
11 posed yet another means that he had of coercing
12 her to engage in future prostitution by the
13 threat of exposing this humiliating and
14 embarrassing video.

15 THE COURT: All right. Any evidence
16 suggesting, alleging, and/or asserting that the
17 defendant had a prior murder conviction. I
18 guess we've talked about that.

19 Evidence of any unlawful drug-related
20 activity outside the scope of the conspiracy
21 alleged in the indictment between May 2015 and
22 March of 2016 unless the government can
23 demonstrate that such evidence is relevant to
24 proving the alleged crime.

25 So your point is that continuing drug

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1 activity afterwards is relevant. So I'll hear
2 you on that.

3 MS. SAVNER: More so, your Honor, that drug
4 activity before the charge of conspiracy is
5 relevant because -- so the prostitution and sex
6 trafficking counts range from 2012 to 2016 and
7 about the same time that the drug conspiracy is
8 alleged to have ended. The drug conspiracy is a
9 shorter window occurring from 2015 to 2016 as
10 charged. So it's really the period of 2012
11 through 2015 that the government seeks to
12 maintain this evidence related to the
13 defendant's involvement in drugs, in part
14 because that was how, one, he operated his
15 prostitution enterprise. The women were
16 participating, many of them, because they were
17 drug addicts, heroin addicts, and he was their
18 supplier.

19 Additionally, it was for some of them, for
20 the charged victims, one of the means of
21 coercion that he used. He manipulated their
22 drug addictions. He was their supplier of
23 heroin. He told them he wouldn't give them the
24 heroin that they needed to avoid withdrawal
25 until they went out on another date and came

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1 back and gave him money, and when they did come
2 back, they split half the money with him. That
3 was the deal at the start anyway. They gave him
4 half their earnings to pay for his associated
5 expenses with his prostitution business, and
6 what in fact they did with the other half which
7 was supposed to be their half was pay him all of
8 that for the drugs that they needed to subsist
9 on and continue to do this work.

10 THE COURT: So the drug dealing, although
11 not relevant necessarily to the drug charges,
12 the Counts 1 through 10, with the exception of
13 Count 2, is totally relevant to actually
14 understanding the relationship between the
15 defendant and the various women in particular
16 with regard to coercion.

17 MS. SAVNER: Yes, your Honor.

18 THE COURT: The video that depicts the
19 defendant urinating on other persons.

20 MS. SAVNER: Yes, your Honor. So there's
21 three videos related to this. There's a video
22 in which the defendant announces that he's going
23 to, I believe, start a series of videos in which
24 he is, videos titled, quote, "pee on you," in
25 which he tells the audience, quote, "I'm just

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1 pissing on bitches and going to see how far I
2 can go." So this is, again, like the preamble,
3 so to speak, of the walnut video. He's sort of
4 announcing his plans in advance of what he's
5 going to do, and then there are two videos of
6 the defendant, in fact, urinating on two of the
7 women that work for him. One a charged victim
8 and one a worker in his drug business.

9 Again, these videos, the fact that they
10 were kept and maintained by him and catalogued
11 in his library among other embarrassing and
12 humiliating videos of these women contributed to
13 the fear of reputational harm that he posed to
14 them and that was part of the means of coercion.

15 These videos also demonstrate the sort of
16 just bodily control that he had over them which
17 was, you know, part of the coercion as well. He
18 was dominant over them in every aspect and this
19 is certainly corroborative of that.

20 THE COURT: Do you have the two women who
21 will testify to the episode?

22 MS. SAVNER: Yes, your Honor.

23 THE COURT: Okay. Victim A's allegation
24 that the defendant sexually assaulted her after
25 he found out that she had stolen drugs from him.

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1 We've talked about this a little already.

2 MS. SAVNER: Yes, and I would just point
3 out as we have in our response and this proffer
4 that from what I understand of the facts this
5 should be related to Victim B, not Victim A.

6 THE COURT: Yes. Right.

7 MS. SAVNER: So, yes, there was this
8 instance that I mentioned that Victim B stole
9 some heroin from one of the defendant's drug
10 runners, he then put out a bounty for her. She
11 was brought into him and he, you know, kind of
12 took her out back, in fact to a dumpster by a
13 cemetery, just him and her at night. She was
14 very afraid of what he would do to her. He
15 raped her at the cemetery, and then said you
16 work for me now and implying that she had to
17 prostitute for him to pay him back for the money
18 that she stole from him.

19 So that in and of itself is the fact that
20 the sexual assault is relevant because it shows
21 the reasonable fear that she had that if she
22 didn't thereafter go and work for him and pay
23 him back that she would suffer severe
24 consequences including the use of physical force
25 and potentially sexual violence again, and,

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1 again, this is during a charged period of
2 trafficking for this victim.

3 THE COURT: Okay. Victim C's explanation
4 about why she participated in commercial sex
5 acts where she's talking about her fear of black
6 people to begin with because she was molested
7 and beaten as a child by a black person. That's
8 where she mentions the fact that he's in the
9 Bloods.

10 So do you seek to introduce this reason for
11 her fear?

12 MS. SAVNER: You know, the government
13 doesn't really intend to elicit that she feared
14 him necessarily because he was black, but she
15 did say in this car ride which Mr. Grady has
16 discussed wherein the, that is sort of the main
17 piece of the coercion for this victim was this
18 car ride and her setup with the defendant. She
19 did tell him about her history of trauma. She
20 has scars on her arms of, you know, self-harm
21 and cutting that she showed him, that were
22 visible to him, and she talked about her history
23 of trauma, and given the fact that the defendant
24 then knew of it and was able to use it to compel
25 her to do what he wanted to do is relevant to

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1 the coercion of Victim C and how she was
2 compelled to prostitute.

3 THE COURT: But do you intend to use her
4 feelings about black people, Bloods we've talked
5 about already, is that coming in or do you want
6 to engage in the comments about self-harm and
7 his knowledge of self-harm?

8 MS. SAVNER: I mean, I think most relevant
9 is what the defendant knew and what he was able
10 to seize on and use to compel her to prostitute,
11 right? So to the extent that she told him about
12 her activity of sexual abuse and trauma and
13 self-harm which she will testify to on the
14 stand, that I believe is relevant and should
15 come in. The government doesn't intend to
16 elicit the fact that she was afraid of black
17 people. I mean, to the extent that she might
18 have said that to the defendant in that car
19 ride, I personally don't know if she did, it
20 might be more relevant, you know, then, but --

21 THE COURT: Okay. Then lastly, a video of
22 the defendant explaining why he was upset with
23 minor Victim E.

24 MS. SAVNER: This is the video referenced
25 wherein the defendant does carry out his threat

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1 to sort of violate the women who cross him in
2 this way of exposing them. So he posted this
3 video publicly on his Facebook account in which
4 he calls out minor Victim E for stealing from
5 him, you know, kind of, it's a ten-minute video
6 where he sort of goes on a monologue about how
7 he brought her up from nothing, and she had the
8 audacity to steal from him, and then he shows
9 photos of her in sexually suggestive positions
10 and says, you know, I know her more like this.
11 And, you know, suggesting that she was
12 prostituting or that she was, you know, in some
13 other way sexually promiscuous. And again,
14 these were photos. He used photos in this video
15 that he kept in his library of photos and videos
16 that he kept on all of the women, and this
17 evidence of the video itself and the fact he
18 posted it, it was seen by victims and witnesses,
19 and they will testify to its effect on them.

20 THE COURT: All right. Let me ask you
21 whether you need pretrial rulings on a lot of
22 these issues. I clearly understand that you
23 have the obligation to prove coercion. I
24 understand that you're going to approach that
25 with those three different approaches, including

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1 the regulation of drugs being given to women,
2 the force and threats. Clearly, you should be
3 afforded the opportunity to use evidence of
4 force, evidence of coercion, to satisfy that
5 element.

6 The problem for me at this particular
7 juncture is ruling upon a particular video or a
8 particular photograph. You've got 20,000
9 photographs apparently and you may introduce
10 obviously a small number of photographs, but to
11 actually rule on the use of a video, et cetera,
12 you really should be in possession of all of the
13 facts during the trial, but that necessarily
14 impacts opening statements. You don't know
15 exactly whether it's coming in or whether it's
16 not coming in, and those things that are
17 particularly important and well established, you
18 may really want a ruling in advance.

19 MS. SAVNER: Yes, your Honor. And not to
20 mention that, but sort of the feasibility of how
21 we would decide these sort of things mid trial,
22 I don't know how your Honor envisions it going,
23 but it would seem time-consuming and require
24 many side bars to sort of get into it and also
25 sort of, I mean, we obviously can somewhat

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1 anticipate what the witnesses will say in
2 response to any given question, but we can't
3 fully anticipate, you know, what tangents
4 they'll go down. So I worry about being in the
5 position of them sort of coming out with
6 information about one of these things that's
7 sort of been reserved and not having a ruling.

8 And I also think that there can maybe be a
9 distinction made between, at least as to the
10 videos, so the urination videos, the walnut
11 videos, the video explaining why the defendant
12 was upset with minor Victim E, that discussion
13 of these videos by the witnesses is sort of the
14 middle ground where that your Honor could
15 determine that that was admissible at this point
16 given that they would be explaining the
17 relevance to them of these pieces of video
18 evidence in the context of their testimony, and
19 maybe reserve on the admission of the videos
20 themselves which is the more prejudicial piece
21 of it, depending on how the witnesses testify
22 about how it's affected them.

23 THE COURT: Well, that's interesting. So
24 just take as an example the urinating videos.
25 You would have the two women testify about that

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1 experience. That's less prejudicial. It's
2 clearly probative. And then reserve judgment on
3 the use of the video of that episode.

4 MS. SAVNER: I mean, that certainly is not
5 the government's first preference. The
6 government believes that the videos themselves
7 are extremely probative, corroborates what the
8 witnesses will say were their experiences, but I
9 think, you know, in my reading of the defense's
10 theory, the videos themselves are the more
11 prejudicial pieces of evidence than testimony
12 concerning what happened in them. So to the
13 extent that the women testify about the
14 experience, testify about how the experience
15 affected them, and the court allows them to do
16 that in advance, then the matter of whether the
17 videos themselves can come in is something that
18 can be --

19 THE COURT: Then if there's
20 cross-examination of those witnesses and the
21 cross-examination impeaches the reliability of
22 what they've said, then that becomes relevant to
23 whether or not the video can be introduced to
24 and substantiate the testimony of the witness
25 which is I suppose a third scenario.

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1 All right. Okay. All right. So those are
2 the specific things that I thought had not been
3 addressed before. Are there other issues that
4 you want to address at this point?

5 MS. SAVNER: No, your Honor. Not based on
6 the, I mean the defendant has another motion to
7 exclude evidence that --

8 THE COURT: We'll do that later.

9 MS. SAVNER: Yes, your Honor.

10 THE COURT: Okay. Why don't we take a
11 break. Ten-minute break at this point. Start
12 again at 11.

13 (Recess taken 10:49 - 11:02 a.m.)

14 THE COURT: Okay. So in regard to those
15 motions I just discussed with the government,
16 did the defense want to respond to 350?

17 MS. SEN: Yes, your Honor.

18 THE COURT: Okay.

19 MS. SEN: As your Honor pointed out, I'll
20 just start and go through the same list in the
21 same order.

22 THE COURT: Okay.

23 MS. SEN: With respect to the sexual
24 assault, I think the court had pointed out this
25 happened in July of 2016. I think the

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1 government admits that no one else was even
2 aware of it. I don't understand how it's
3 relevant. It has absolutely no relevance to the
4 drug trafficking. The drug trafficking
5 conspiracy ended as of March 2016. This was in
6 July, and --

7 THE COURT: Well, the relevance from the
8 government's perspective is that if the
9 defendant feels that one of the women violated
10 his rule, then he responds with violence and in
11 particular, demeaning violence, and this is an
12 example of that, even though it's after the
13 conspiracy or after the charged offenses, but
14 what's also troubling about it is it's not
15 because ML violated his rule in regard to
16 prostitution, it's for another reason totally;
17 that is, she went with another guy. And so
18 there's a little less relevance, it seems to me.
19 Just thinking off the top of my head here.

20 MS. SEN: And your Honor, I would point out
21 that our client disputes that that ever
22 happened. So this is an issue that has not been
23 established. I haven't seen any police reports
24 about this. I'm not sure that this, this is an
25 allegation, and for it to come in just suggests

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1 that, you know, then our client is fighting this
2 allegation which is just this woman's word
3 against his because it fits into the government
4 narrative of our client, this is what he did
5 when he violated people.

6 I think the court is right in terms of its
7 relevance. It's not, what I'm saying, it wasn't
8 relevant to the drug conspiracy. There's no
9 indication here that she did do anything that
10 would have caused him to sort of perform this
11 act, and he disputes it all together. So we
12 would argue that it is just not relevant to the
13 charges here. No one else was aware of it. I
14 mean, the government admits that.

15 So the idea that people were concerned and
16 that they felt like this could happen to them
17 and sort of was used as some kind of threat, I
18 don't think fits with, I just don't see how this
19 is relevant.

20 THE COURT: Well, it's not relevant because
21 other people would have known or not known about
22 it. It's relevant because it's a pattern of
23 conduct and its relevance is because it is that
24 pattern of conduct.

25 Okay. I'll take that clearly under

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1 advisement.

2 Evidence related to the people shooting of
3 people allegedly associated with the defendant
4 in New York City.

5 MS. SEN: Again, your Honor, and I think I
6 sort of, in our response I put together this
7 idea of the murder conviction, shooting people
8 in New York. I haven't seen anything from any
9 witness that they were afraid of our client
10 because they were aware, had heard about him
11 shooting anybody, and to allow that to come
12 in -- if a witness gets up and says this, it's
13 not something that has been stated in any
14 reports that we've seen of any witness, and not
15 only that, there's so much evidence, your Honor,
16 of these witnesses, I mean, the number of
17 photos, messages, friendly messages that these
18 witnesses have exchanged with our client outside
19 of the time period, during the time period, of
20 these alleged activities, it just completely
21 undermines any allegation.

22 THE COURT: Well, have you received a
23 proffer from the government as to why they would
24 introduce or what they would actually introduce
25 about shooting of people in New York?

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1 MS. SEN: Only what they've provided in
2 this motion, your Honor. Nothing more specific
3 than that.

4 THE COURT: Do you know if there's any
5 statements of the defendant to any of the women
6 about his conviction for either manslaughter or
7 murder used in a coercive or threatening manner?

8 MS. SEN: Our client disputes that, and
9 your Honor, our client has also pointed out to
10 us he was on parole for a manslaughter
11 conviction, and he was rearrested in Vermont and
12 that was all over the news. It was in
13 newspapers, it was a publicly known fact. So
14 our client says that he would have never, you
15 know, used, you know, mentioned it or used it in
16 that kind of a way.

17 THE COURT: Well, but the relevant question
18 is whether or not there are witnesses out there
19 who heard him say, "I was convicted of
20 manslaughter or murder," and it was used in the
21 context of a coercive environment.

22 MS. SEN: Your Honor, we haven't seen
23 anything that supports that.

24 THE COURT: Okay. Let me get back to the
25 government and just get a proffer as to what

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1 exactly would be used there.

2 All right. The walnut challenge.

3 MS. SEN: Your Honor, as I stated in the
4 papers that we filed, the government's argument
5 that this is somehow indicative of coercion, it
6 is pretty clear if the government is talking
7 about the video itself that they are, this group
8 of people are going from room to room and asking
9 women whether or not they want to participate,
10 and they say no. And the government's theory of
11 this whole case all along has about been that
12 Mr. Folks is alleged to have used coercive
13 tactics, both for the women who were involved in
14 prostitution as well as with the women who are
15 involved in distributing drugs.

16 So the idea that somehow now the government
17 is standing up and saying well, those women
18 weren't part of the prostitution and so they
19 weren't really feeling the coercive effect. I
20 mean, frankly, the government's argument and its
21 theory of this case all along has been that
22 Mr. Folks has been coercing these women into
23 being involved in the drug business as well as
24 in the prostitution business. So to say that
25 somehow this video, discounting the fact that it

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1 doesn't show coercion by suggesting somehow that
2 although those were people not involved in
3 prostitution and that they could say no whereas
4 the women involved in prostitution couldn't say
5 no, it's just not clear from the video itself,
6 and I think the only way for the court honestly
7 to evaluate the coercive nature of this video
8 and, frankly, all of the other videos is by
9 having the government submit them to the court
10 for the court's review because the defense does
11 not see these videos as coercive and that
12 they're not relevant, your Honor.

13 THE COURT: What do you think about the
14 suggestion from the government that it be
15 permitted to ask the witnesses to describe what
16 happened, and the videos would be held in
17 abeyance and that would obviously be much less
18 prejudicial. What do you think of that
19 suggestion?

20 MS. SEN: Well, your Honor, I think that
21 that is almost even more prejudicial because I
22 don't think my, I anticipate that what these
23 witnesses are going to say is not going to
24 reflect what's on these videos because these
25 videos do not show coercion, and we feel very

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1 strongly that they are not relevant, and
2 whatever probative value that they might have is
3 far outweighed by the prejudice of these videos.

4 So the idea that somehow you would allow
5 these witnesses, it means that the videos come
6 in ultimately, and I think that the court first
7 has to look at them to determine are these even
8 relevant because I don't see how they're
9 relevant.

10 THE COURT: Okay.

11 MS. SEN: That's our position, at least,
12 your Honor.

13 THE COURT: It's a little bit of an
14 inconsistent position. What you're basically
15 saying is that the videos are very prejudicial.
16 At the same time, you're suggesting that the
17 videos are not showing any coercion. Is that
18 inconsistent?

19 MS. SEN: I don't think so, your Honor.
20 They don't show coercion. They're just not
21 relevant. I mean, if the idea is that they're
22 relevant because they show this coercive line of
23 conduct, I mean at least for the walnut
24 challenge video for certain. There is nothing
25 about that video that's coercive. I think

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1 what's prejudicial about it is just the nature
2 of the activity going on is going to be
3 off-putting to a lot of people, and so that's
4 the prejudice. I mean, if you look at this
5 video, your Honor --

6 THE COURT: Okay. Then tell me your
7 reaction to their suggestion that the defendant
8 engaged in demeaning activity as a control
9 mechanism to be able to control people who are
10 working for him. That is, that he really
11 demeaned them as persons or sexually, et cetera,
12 and that is a part of a whole process by which
13 he gains control over them. Should the
14 government, assuming that there's a video which
15 is not coercive but demeaning, should the
16 government be able to introduce that kind of
17 evidence to show this is a mechanism by which he
18 sought control.

19 MS. SEN: Well, if there was something that
20 was evidence of that, we would need to see it,
21 and not only that, your Honor, but --

22 THE COURT: But the walnut video is pretty
23 demeaning. I mean, I haven't seen the video,
24 obviously, but at least the description of the
25 episode is quite demeaning. And they would say

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1 well, it's coercive, but if it's not coercive,
2 it at least is demeaning of these particular
3 women, and that was a way in which he gained
4 control over them.

5 MS. SEN: Well, your Honor, I would point
6 out in that video that the women who are engaged
7 in this activity are laughing, and I would also
8 point out in that video that the women who won
9 the challenge were paid \$500. So the idea, I
10 mean, you know, so the thing is that you get
11 into these very -- yes, to you or me it may seem
12 demeaning, but there was a bargain that was made
13 there, and it doesn't show coercion. To the
14 extent it shows that it was demeaning, I mean,
15 honestly, your Honor, you have to just look at
16 the video --

17 THE COURT: All right.

18 MS. SEN: -- to sort of get the sense of
19 how demeaning it was in terms of the entire
20 context. I think that's really our point is
21 that the way a witness might describe it -- and
22 I would also point out that they are basing
23 their argument about, I mean, at least until now
24 the government has been basing its argument
25 about the coercive nature of this video on the

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1 one woman who didn't enjoy participating in it.

2 Now, the other women who actually engaged
3 in this, you can see them on the video. They're
4 laughing, they're joking around, there's a kind
5 of lighthearted atmosphere, and if there was one
6 woman who was not happy about it and she was not
7 videoed or at least my understanding is any
8 video of her was deleted, then I think that that
9 also impacts sort of the relevance of it with
10 respect to the coercive element of the video as
11 well.

12 THE COURT: Okay. All right. Any evidence
13 suggesting or asserting the defendant had a
14 prior murder conviction. Again, I guess I'm
15 asking for clarification as to whether in fact
16 there's evidence of the defendant saying that as
17 opposed to other ways that people may have
18 learned about that because that obviously is
19 prejudicial, but if the defendant said to a
20 person, you know, "I've been convicted of
21 murder" and in a coercive way, then that is
22 highly probative. Would you agree with that?

23 MR. SEN: I think it depends on the context
24 in which it is stated, your Honor, and my
25 understanding and what I said before is that our

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1 client has never used it as a coercive
2 threatening statement.

3 THE COURT: Okay. All right. Evidence of
4 unlawful drug-related activity outside the scope
5 of the conspiracy, and in particular the
6 government seeks to introduce drug-related
7 activity from 2012 to 2016 as a part of Counts
8 10 through 14. Essentially, they're arguing
9 that he used drugs as a coercive technique to
10 control the conduct of the people who are
11 working for him, and your motion has sought to
12 exclude all of that, but in fact it's quite
13 relevant, isn't it? To the coercive nature of
14 the relationship between the defendant and
15 people working for him?

16 MS. SEN: Your Honor, I guess what our
17 focus was on sort of other activities related to
18 the drug conspiracy that the government is
19 alleging. I think with respect to the drug use
20 of the women themselves, I don't think anyone is
21 going to deny that there was drugs being used
22 and bartered for. So with respect to -- I think
23 the only concern there is that there's not
24 evidence that there was drug distributing going
25 on. I think the fact that these women were

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1 using drugs is different from the conspiracy to
2 distribute drugs.

3 THE COURT: But then I thought that the
4 relationship that existed between the defendant,
5 at least according to the government now, that
6 between the defendant and the women not only was
7 to control the use of drugs to require them to
8 be involved in prostitution but they also were
9 selling, and I don't know if the selling goes
10 back to 2012, but that's all part of the
11 relationship between these women and the
12 defendant, I thought. And if you would allow
13 the government to introduce testimony of drug
14 activity to encourage coercion to prove coercion
15 for prostitution, it's sort of an artificial
16 distinction to also participate in small amounts
17 of drug activity, right?

18 So between 2012 and 2016, if there were
19 some women who were engaged in prostitution but
20 also were selling drugs, and they would get some
21 of the drug proceeds in terms of drugs for them,
22 wouldn't that be relevant to show the
23 relationship between the defendant and these
24 witnesses?

25 MS. SEN: Your Honor, I think that my

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1 understanding of the facts, and I could be wrong
2 about this, but my understanding is that the
3 selling of the drugs by the women is sort of
4 within the conspiracy time frame and that the
5 supplying of the drugs, there may have been
6 drugs that were being bought and provided to
7 women, but that the actual women going out and
8 selling is something that did not happen.

9 THE COURT: Okay. So before May of 2015
10 what you're saying is that the women didn't sell
11 drugs. That was the drugs were only used as a,
12 well, the government would argue that they're
13 used as a coercive ploy.

14 MS. SEN: I certainly don't think it goes
15 all the way back to 2012. I'd have to go back
16 and look at the exact dates for each particular
17 witness, your Honor, but --

18 THE COURT: So assuming that they've got
19 some evidence that some of these women were
20 selling drugs as well as engaging in
21 prostitution prior to May of 2015, that is prior
22 to the charged offenses, wouldn't that be
23 relevant to put context to the relationship
24 between the defendant and the witnesses?

25 MS. SEN: If there are witnesses who

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1 distributed before then, I think that we would
2 have to look at the context in terms of was it
3 part of the conspiracy, were they selling, were
4 they getting things, was it known, was it
5 something that they were doing on their own, is
6 it something they're doing at our client's
7 direction. I mean, I think all of that at a
8 very detailed level would have to be looked at,
9 your Honor, so I don't want to say definitively
10 that we would agree to allowing that to come in,
11 but if there was evidence that they could show
12 that this was something they were doing on
13 behalf of our client or involved in a conspiracy
14 of some sort, I think that that would be
15 relevant, but I can't see how -- if they're
16 getting drugs from our client and then going off
17 on their own and selling them, I don't really
18 see how that would be relevant.

19 THE COURT: Okay. All right. How about
20 the urination video?

21 MS. SEN: Your honor, I think it's the same
22 issue as with the walnut video.

23 THE COURT: Would you have any objection if
24 somebody is going to testify that the defendant
25 as a demeaning coercive act urinated on them,

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1 would you have any objection to holding back the
2 video and allowing that witness to testify what
3 that witness experienced to describe this
4 particular episode obviously without the video?

5 MS. SEN: I think we would object to that,
6 your Honor. I mean, either the information is
7 relevant and admissible or it isn't, and I think
8 that the court needs to evaluate and do the 403
9 balancing test as to whether or not the
10 probative, whatever probative value that video
11 might have is outweighed by the prejudice.

12 THE COURT: What you're saying is that if I
13 look at the video, it becomes so noncoercive in
14 nature that this is basically an either
15 consensual or an irrelevant act.

16 MS. SEN: That's what we would argue, your
17 Honor.

18 THE COURT: Okay. The allegation, Victim
19 B, allegation that she was sexually assaulted
20 after he found out that she had stolen drugs.

21 MS. SEN: Your Honor, again, we would
22 object to this. We would object and dispute
23 that this occurred. Our client disputes that
24 this is what happened. And again, we would
25 argue that any probative value that it may have

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1 arguably is just not, is far too prejudicial to
2 be allowed in.

3 THE COURT: Okay. Victim C's explanation
4 as to why the person who said that she was
5 scared because she had been assaulted by black
6 persons, I think the government's not going to
7 introduce that particular language. The Bloods
8 is a separate issue that the court will address.
9 Anything else to add to that?

10 MS. SEN: I would just add that the case
11 law that the government relies on for that, I
12 mean, it's sort of talking about a fear of black
13 people as a vulnerability, and I just don't see
14 that equating to the same kind of vulnerability
15 as the case he cited that the government relies
16 on.

17 THE COURT: Okay. Then the last is the
18 video explaining why he was upset with minor
19 Victim E.

20 MS. SEN: Your Honor, that video was
21 apparently posted in early March of 2016. So
22 for any witness, the last claim regarding human
23 trafficking is February of 2016. That anyone
24 who is involved in the human trafficking
25 endeavor says that they became worried about

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1 their reputational harm based on the posting of
2 that video is impossible. And similarly, it's
3 not clear to me that even with respect to the,
4 even though the drug conspiracy extends into
5 March, it's not clear to me that there's any
6 person who was working allegedly in the drug
7 business was aware of that video and that made
8 any difference to them in terms of reputational
9 harm. So we would argue that that video is just
10 not relevant at all because it's, just from the
11 date that it was posted, there's no way that it
12 could have had relevance to anyone's state of
13 mind before it was posted.

14 THE COURT: Okay. All right. So what
15 you're suggesting is that I ask the government
16 for the various videos.

17 MS. SEN: Yes, your Honor.

18 THE COURT: Okay. Anything else in regard
19 to these issues?

20 MS. SEN: No, your Honor. Thank you, your
21 Honor.

22 THE COURT: Okay. The government, do you
23 want to respond?

24 MS. SAVNER: Yes, your Honor. Just
25 briefly, your Honor, touching on a few points on

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1 some of these matters. As to the first, the
2 rapes of ML, your Honor is correct that this in
3 the government's view is proof of the violation
4 that he threatened to inflict on many of the
5 women that worked for him. The fact that it
6 wasn't directly related to a violation, a
7 perceived violation of her related to her
8 activities as a drug worker of his, I think is
9 irrelevant.

10 THE COURT: But doesn't that make it less
11 probative? I mean, the fact is the reason why
12 that he assaulted her was because she developed
13 a relationship with another person.

14 MS. SAVNER: Yes, your Honor, but you'll
15 hear from the women who worked as prostitutes
16 for him, the women that worked as drug workers
17 for him, that he controlled all aspects of their
18 lives. He didn't want his prostitutes buying
19 drugs from other people. He didn't want them
20 seeing other people. They weren't allowed to
21 have men in their hotel rooms. All of that was,
22 would be considered a violation, and all of that
23 was one of the means he used to control all of
24 the aspects of their lives to limit their
25 contact with the outside and their resources and

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1 also rely solely on him.

2 THE COURT: That's a perfect example of why
3 a lot of these issues have to be resolved during
4 the course of the trial. I mean, you didn't, I
5 did not know that you've got testimony, you've
6 got people coming in and saying that that
7 control was everywhere, and that level of
8 control you want to prove --

9 MS. SAVNER: Yes, your Honor.

10 THE COURT: -- by offering the testimony of
11 these various witnesses, and then the assault on
12 ML is just an example of the abusive control
13 that he demanded of the people who worked for
14 him, right?

15 MS. SAVNER: Yes.

16 THE COURT: Okay. All right.

17 MS. SAVNER: So as to the next, and I will,
18 as we've been doing, sort of group the evidence
19 related to him shooting people and the evidence
20 of the murder conviction, I will just point out
21 that this is the defendant's motion to exclude
22 evidence, and they specifically sought to
23 exclude evidence that the defendant had shot
24 people in New York without tying it to any
25 specific statement of any government witness or

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1 any material provided in discovery. So we too
2 don't know exactly what they're referring to
3 when they move to exclude evidence related to
4 the shooting of people allegedly associated with
5 the defendant in New York City. But I think
6 we've, I believe we're somewhat on the same page
7 that it's a matter to be explored as to how the
8 witnesses knew, came about the information and
9 how it affected them.

10 THE COURT: Okay.

11 MS. SAVNER: As to the walnut video,
12 Counsel suggested that, outright stated that the
13 videos don't show coercion, and that's just not
14 a matter to be decided at this point. You know,
15 the matter of the coercive nature of the
16 defendant's activities is the central issue for
17 the jury to decide.

18 THE COURT: Well, what proffer would you
19 make as to what response the two women who went
20 through the walnut challenge had? What was
21 their reaction to that? Did they feel coerced
22 in particular? Did they feel demeaned?

23 MS. SAVNER: One of them, as I've mentioned
24 before, was so distraught during the video and
25 crying and looked unhappy that the defendant

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1 immediately afterwards said to her, "I can't use
2 this video, it looks too much like rape."

3 That's how unhappy she was participating in it.
4 To hear her talk about it now, it's still one of
5 the most traumatizing things the defendant did
6 to her, one of the most degrading things she
7 experienced at his hand and the fact that she
8 knew because the defendant told her he had
9 video'd it that he could use the video made her
10 thereafter fear reputational harm.

11 With both her and other victim who
12 participated, they were both participating for
13 money or for money to use for drugs or directly
14 for drugs, and that also shows the level of
15 control that the defendant had over them, what
16 he could get them to do just to make money for
17 drugs or just to get drugs.

18 And that's also part of the government's
19 whole theory of this case is the element of the
20 drug coercion that the defendant used. I mean,
21 if it weren't for these women's drug addictions,
22 many of them would not be in the position of
23 being possibly compelled to prostitute, right?
24 So the fact that their drug addictions were so
25 severe that their addictions could be

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1 manipulated, their supply of heroin manipulated
2 so that they would or wouldn't participate in
3 prostitution at the defendant's hand is also
4 corroborated with the fact that they were
5 willing to participate in this objectively
6 degrading and humiliating experience just to
7 make a little money which they will thereafter
8 testify they immediately spent on drugs.

9 THE COURT: All right.

10 MS. SAVNER: As to the drug-related
11 activity predating the conspiracy, I think the
12 government does not intend to introduce evidence
13 that the women were selling drugs for the
14 defendant prior to the charged conspiracy. That
15 the evidence related to drugs is related to the
16 defendant, from the 2012 to mid-2015 period, is
17 related to the defendant's access to heroin and
18 crack, the drugs that the women required to
19 engage in prostitution, and that he distributed
20 it to them and that he was their supplier of
21 heroin.

22 THE COURT: And they were engaged in
23 prostitution.

24 MS. SAVNER: Yes.

25 THE COURT: All right. Okay.

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1 MS. SAVNER: Again, with respect to the
2 urination videos, the defense posits these as
3 consensual, showing that the video themselves
4 just like with the walnut videos shows some sort
5 of consensual act, but that's sort of taking the
6 image in a vacuum without testing the witness's
7 experience and without putting that experience
8 in their own words for the jury to hear and for
9 the jury to decide whether these acts
10 contributed to the coercion or were indicative
11 of the coercion that the defendant used.

12 So just because it is the defense's view
13 that these videos don't show coercion on their
14 face is I think a judgment that should not be
15 permitted to rule the day as to any of these
16 videos and the victim's experiences with them,
17 and to the extent the videos corroborate those
18 experiences, it's highly relevant. All of the
19 videos.

20 THE COURT: Any objection to submitting the
21 videos for in-camera review?

22 MS. SAVNER: No objection, your Honor,
23 although as I've mentioned, what may be
24 coercive, you know, what may or may not appear
25 coercive on the face of something, you know, a

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1 smiling photograph doesn't necessarily imply
2 that the person was there happily, right? So I
3 would still ask that if your Honor is at all on
4 the fence that you reserve until you hear the
5 testimony of the women who were involved in how
6 it affected them.

7 THE COURT: Okay.

8 MS. SAVNER: But we are happy to submit any
9 of these videos.

10 With respect to the assault of Victim B, I
11 mean, the defense's main argument at this point
12 seems to be that it's not admissible because it
13 didn't occur because their client says it didn't
14 occur whereas the government witness will say it
15 did occur, and that, again, seems to be a matter
16 of cross-examination and not a matter to be
17 decided ex-ante in the world of 403 balancing.

18 I think we've addressed the various
19 statements of Victim C. The government will
20 elicit or won't elicit, obviously depending on
21 your Honor's ruling on this, on the gang
22 conviction so I won't get into that.

23 Lastly, as to the video of minor Victim E,
24 yes, the government does agree that the video
25 was posted in July of 2016, and therefore after

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1 the charged conduct of sex trafficking.
2 However, this threat of reputational harm, this
3 threat to violate you if you violate me was one
4 that was ever present as the witnesses will
5 testify.

6 THE COURT: So that you will have witnesses
7 who will say this is a constant pressure, he's
8 always threatening reputational harm, he's
9 always threatening to publish these embarrassing
10 photographs, and here in July of 2016 it
11 confirms what they said about what he would do,
12 the defendant.

13 MS. SAVNER: Yes, your Honor.

14 THE COURT: So it's not that all future
15 women would rely upon this fear because of this
16 video. It's an example of the corroboration
17 essentially of what they say he said to them.

18 MS. SAVNER: Yes. What he either said to
19 them or what was just clear to them implicitly
20 given the fact that they were aware he had all
21 these photos and videos of them.

22 THE COURT: Okay.

23 MS. SAVNER: Thank you.

24 THE COURT: All right. So the defense
25 motion regarding witnesses' sexual behavior

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1 under 412, I think we've addressed that already,
2 but tell me if you want --

3 MR. KAPLAN: I don't think I have anything
4 to add to that.

5 THE COURT: Think we've done that. Okay.
6 You're seeking to exclude evidence related to
7 the deceased witnesses. There are two deceased
8 witnesses, HA and BL. My understanding is that
9 there's nothing which is going to be introduced
10 in regard to BL. And what the government is
11 suggesting is an option here, they're not going
12 to introduce any records of the death of either
13 of these witnesses. Obviously, the deaths were
14 unrelated to this particular conspiracy.

15 What the government wants is an instruction
16 that the jury cannot consider the fact that
17 these two witnesses were not available to
18 testify. Say they're not available to testify
19 and you're not allowed to consider that in any
20 way which is, I think, a good solution. Tell me
21 what the defense's reaction to that is. They're
22 not going to introduce any evidence of the
23 deaths. This is only just don't consider the
24 fact that they did not testify.

25 MS. SEN: Your Honor, I think that we're

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1 fine with that instruction.

2 THE COURT: Okay. All right. Now, in 353,
3 the motion to exclude Backpage and Facebook
4 records.

5 MS. SEN: Thank you, your Honor.

6 THE COURT: Just before you start, you've
7 been in discussions with the FBI about the
8 availability of records that you are seeking and
9 you sort of left your memo suggesting that
10 progress is being made. Has it been made?

11 MS. SEN: No, your Honor. I got an email
12 from the FBI website yesterday, and I can
13 explain to your Honor in a moment, but
14 Mr. Kaplan, can I consult with him for just a
15 moment, please?

16 THE COURT: Sure.

17 MS. SEN: Your Honor, our motion is really
18 focused on the Backpage, and I think to the
19 extent that it was, we were moving --

20 THE COURT: Facebook self-authenticating,
21 are you --

22 MS. SEN: I think they still have to be
23 properly authenticated, but I don't believe we
24 would be moving to exclude the Facebook the same
25 way that we are moving to exclude the Backpage

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1 on various reasons. So I can update the court
2 with respect to my communications with
3 counsel --

4 THE COURT: That self-authenticating rule,
5 the change in the rule?

6 MS. SEN: Yes, your Honor.

7 THE COURT: Did you notice who was the
8 chair of the committee that changed the rule?

9 MS. SEN: Could it have been you, your
10 Honor?

11 THE COURT: Yes. Yes. Yes, I was.

12 MS. SEN: So I think the rule worked in
13 just the manner you had envisioned.

14 THE COURT: I have no doubt it would. But
15 anyway, the government has also said that they
16 don't need to rely upon self-authentication in
17 the Facebook they've got so many links to that
18 Facebook account. Defendant using that account,
19 et cetera.

20 All right. So the Backpage.

21 MS. SEN: So to answer the court's first
22 question I received -- so as the government had
23 represented, we've had these communications back
24 and forth. We had issued a trial subpoena. I
25 had spoken to Attorney Bubb at the FBI regarding

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1 having that request run, and at that point
2 that's when we submitted the Declaration of the
3 FBI agent or Special Agent Childress who
4 explained that they weren't able to do it.

5 So in January it appears that they were
6 starting to look at this issue, although I
7 wasn't aware of that until some time in March.
8 At that point, Attorney Bubb reached out to me
9 and said if you have a more specific request,
10 please let me have that. And so on March 19th,
11 I sent a followup request with a specific phone
12 number that we had wanted the FBI to search for
13 on the server, and I hadn't received any
14 response. And yesterday I got sort of a form
15 response, and I had also asked the FBI to run
16 the search as we had requested in the original
17 subpoena, and the response I got yesterday said
18 that they were not responding to subpoenas
19 because they were providing the information
20 voluntarily so resubmit the request by letter or
21 by email. So it's a little bit confused because
22 I did submit a letter separately at Mr. Bubb's
23 request in March. So at this point I don't
24 think that there's been any forward movement in
25 terms of running that search.

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1 THE COURT: Okay.

2 MS. SEN: And it's not, I don't have any
3 sense and maybe the government can speak to this
4 as to what sort of time frame they have or if
5 that could even occur.

6 But with respect to the Backpage records,
7 so there's basically a couple of grounds on
8 which we're challenging them. The first ground
9 is this issue of not being able to access them,
10 and the government makes a lot of
11 representations in its opposition about what
12 Backpage's retention policies are, what kind of
13 records it would keep. I don't think there's
14 anyone except for someone who is at Backpage who
15 can speak to how long the records were kept, who
16 can speak to what kind of data was kept.

17 So, for example, just because in response
18 to a subpoena Backpage may only provide you an
19 ad with some limited administrative data doesn't
20 mean it doesn't have in its records the actual
21 image that was submitted that would have
22 contained metadata and other information about
23 the image that was submitted to be uploaded.

24 So the scope of what Backpage actually held
25 and retained and how long it retained it for, I

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1 think that the government sort of speculates as
2 to what information it would have. Not only
3 that, the government suggests that because we
4 cannot identify what exact exculpatory
5 information might be available, we're not
6 entitled to it. And I don't think that's quite
7 the rule, your Honor, and I think we have argued
8 that there may be exculpatory information in the
9 form of ads related to women posting, you know,
10 witnesses in this case posting ads with IP
11 addresses that are clearly not related to our
12 client during the same time period. There would
13 be exculpatory information, we believe, if the
14 search was able to be run. That's really our
15 main point with respect to that.

16 Mr. Kaplan and I were appointed at the end
17 of April. At that point when we were appointed
18 Backpage had already been seized. I understand
19 the government is arguing that we're having this
20 windfall sort of argument about how just because
21 Backpage got seized, we should be, our client
22 shouldn't have any kind of benefit in that those
23 records were never requested before.

24 I can only speak to what Mr. Kaplan and I
25 can do once we were appointed. At that point,

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1 the servers had been seized by the FBI and
2 clearly we felt like it was something that was
3 necessary to go after and to request.

4 THE COURT: All right. So I mean, you're
5 seeking to prevent the introduction of the
6 Backpage records. Right? Because you may have
7 been denied exculpatory information. That's a
8 really pretty severe request, obviously. The
9 Backpage records, pretty fundamental to the
10 government's case, and there's no question they
11 got the records in a good faith exercise of its
12 subpoena power so they got the records lawfully.
13 Those have been turned over to you.

14 So what are alternative remedies that you
15 would seek absent the exclusion of the Backpage
16 records? Are there instructions that you may
17 seek or is there something less dramatic or less
18 draconian or some remedy that would be more fair
19 in light of the fact that there's no real proof
20 that you have been denied exculpatory
21 information?

22 MS. SEN: I would have to think about that,
23 your Honor, in terms of a sort of a thoughtful
24 remedy short of exclusion. I don't know that
25 there would be, but I would have to think about

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1 that a little bit. Can we get back to the court
2 on that?

3 THE COURT: Yes. Okay. I mean, seeking
4 exclusion of the records really when the
5 government has acted in good faith, frankly, and
6 there is no showing that you've been denied
7 exculpatory information. It's speculative at
8 this point. It's a very dramatic remedy.

9 MS. SEN: I appreciate that, your Honor,
10 but it is something that we may come back to the
11 court with a request for some kind of remedy to
12 deal with that situation short of exclusion.

13 THE COURT: Okay. All right. Government
14 want to respond?

15 MS. SAVNER: Yes, your Honor.

16 MS. SEN: Your Honor? Well, I did have two
17 other -- so with respect to specific Backpage
18 ads, I don't know if you want to hear from the
19 government broadly about the Backpage words.

20 THE COURT: No, go ahead. If you've got
21 more Backpage.

22 MS. SEN: Just specifically and we may be
23 doing this on an advertisement-by-advertisement,
24 record-by-record challenge, there are issues
25 with respect to, for example, the administrative

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1 information that we do have with respect to the
2 records that have been produced in terms of not
3 being tied to our defendant, to our client.

4 THE COURT: Well, you've asked for all
5 metadata.

6 MS. SEN: Well, records that don't contain
7 metadata, that contain IP addresses. I mean,
8 the administrative data that Backpage has
9 provided does contain an IP address, and
10 apparently from the government's response the
11 government never intended, I mean, typically,
12 the reason why we were looking at it from that
13 standpoint is because typically when the
14 government has evidence related to computers,
15 cell phones, you know, you see subpoenas for IP
16 addresses. There's a close tie between this
17 kind of technical evidence, and there's none of
18 that in this case, and it's clear that the
19 government isn't intending to proceed in that
20 way. So that's an issue that we can certainly
21 address through our expert.

22 But to the extent that some of these
23 records are being represented in a way that
24 there is not evidence to prove, you know, I
25 don't think you can say simply by putting up a

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1 record and saying, you know, this was created by
2 Mr. Folks. I think there has to be more than
3 that. So I think that that's where we're going
4 to be coming in with challenges, specific
5 challenges to each record.

6 THE COURT: Okay. All right.

7 MS. SAVNER: So I would like to clarify one
8 thing, and I think that Ms. Sen has sort of
9 acknowledged this, but there's an underlying
10 issue of the authenticity of both the Facebook
11 records and the Backpage records as authentic
12 records of those two companies, and I think
13 that's not in dispute. And so part of the
14 hurdle of authentication is proving that the
15 records are authentic Backpage and Facebook
16 records, and I believe that's what the
17 certifications that accompanied the returns
18 accomplished, and so I don't hear any objection
19 at this point to us seeking to cross the other
20 hurdles of authentication and admissibility --

21 THE COURT: Linking to the defendant.

22 MS. SAVNER: Right. Without a live witness
23 from Facebook or Backpage. But with that
24 understanding, yes.

25 THE COURT: So let me make sure that that's

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1 right. Ms. Sen, are you going to be objecting
2 to that question about whether those records are
3 authentic from Facebook and Backpage or will you
4 accept the documentary submission of the
5 government on that question of authenticity of
6 the records; that is, the fact of they're coming
7 from Backpage and they're coming from Facebook?

8 MS. SEN: Well, your Honor, the government
9 has submitted an updated certification for its
10 Backpage records, but it seems pretty clear what
11 their custodian of records had done is just say
12 that the previous certification was authentic,
13 and I don't think that will be sufficient. I
14 don't know why the government felt that it
15 needed to go out and sort of recertify the
16 authenticity of the records because I don't
17 think they can do that because all the records
18 custodian from my understanding from speaking
19 with counsel, and correct me if I'm wrong, is
20 simply that the Backpage custodian went back and
21 looked at the previous record and said that that
22 was authentic, and I don't think they can do
23 that. I think that we would object to that
24 certification, but to the extent there's an
25 actual records custodian when Backpage existed

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1 that they received those records in the course
2 of this business, I think --

3 THE COURT: If the custodian says that they
4 go back and review what was distributed by the
5 government to you and reconfirms that those
6 records are in fact records of Backpage, right?
7 Why can't you rely upon that?

8 MS. SEN: Because the custodian wasn't
9 looking at the actual records in Backpage's
10 servers because they don't have access to it.
11 So they were just looking, they were just
12 relying on the previous certification to say
13 they were certified. They don't do any
14 comparison of the actual records of what was
15 actually contained in Backpage's files.

16 THE COURT: Okay.

17 MS. SEN: So I don't see how without going
18 and looking at the actual records in Backpage's
19 files they could certify. I mean, they could
20 certify that they were previously provided in
21 response to a subpoena, I suppose, but I don't
22 think that that satisfies that
23 self-authentication requirement.

24 THE COURT: No. They have to be able to
25 say that these are records of Backpage kept in

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1 the normal course of business. And what you're
2 saying is that that second, that second review
3 is only a review of the first disclosure which
4 is not necessarily reliable.

5 MS. SEN: Exactly, your Honor.

6 THE COURT: So what you're suggesting is
7 that the government has to call somebody from
8 Backpage to come here to introduce those
9 records; is that right?

10 MS. SEN: Well, they have provided
11 certifications previously. So I don't know what
12 the updated certification does. To the extent
13 that the prior certification related to the same
14 records, is someone, their custodian of records,
15 going to their servers and saying yes, these are
16 records from Backpage, I think it would satisfy
17 that.

18 THE COURT: All right. Well, this has to
19 get cleared up because if you're going to take a
20 position that they need to bring somebody from
21 Backpage here to testify to authenticate the
22 records, they need to know that way in advance.

23 MS. SEN: Well, I have informed counsel
24 that the second authentication we didn't agree
25 with.

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1 THE COURT: Okay. You want to respond?

2 MS. SAVNER: Yes, your Honor. So to
3 clarify, the records were originally sought and
4 subpoenaed by the government from Backpage while
5 Backpage was still in operation. The records
6 were returned and included what Ms. Sen has
7 noted was sort of the first round of
8 certificates that accompanied them which did
9 state while Backpage was still in operation and
10 had access to these records that they were
11 Backpage records and true and authentic copies
12 produced in the regular course of business and
13 otherwise met the requirements of 803(6).

14 The government sought a second
15 certification from Backpage since Backpage has
16 been seized by the government to comply with the
17 added and new requirement of 902(13). So the
18 records have been established as meeting the
19 requirements of 902(11) and 803(6) under the
20 first set of certificates that were produced
21 while Backpage was still on in operation.

22 When the government went back to Backpage
23 and said can you verify and can you create a new
24 certification that complies with 902(13), the
25 issue that the defense is facing with its

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1 request is also an issue we're facing now
2 because the custodian of records who is still
3 employed, the one remaining Backpage employee,
4 she doesn't have access to the servers. Just
5 like other parts of the government don't have
6 access to the servers to respond to the
7 defendant's subpoena or other request.

8 So she verified by looking at the records
9 that we had received from them previously and
10 that were disclosed to the defense that these
11 appear to be true and accurate Backpage records,
12 and that they were kept in the normal course of
13 business. Yes, she didn't look back at the
14 servers to confirm because she didn't have
15 access to the servers at that point, and based
16 on her knowledge of the processes that Backpage
17 used when it was in operation, she is someone
18 who worked at Backpage while it was in operation
19 as a custodian of records and continues on to
20 this day, confirmed that those records were
21 generated from a process, an automated process,
22 that met the requirements of 902(13).

23 So even if the court isn't satisfied with
24 her ability to authenticate that the records as
25 to 902(11) and 803(6), the prior certifications

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1 should suffice for that purpose, and the new
2 records custodian's knowledge of how the system
3 operated while Backpage was in operation and
4 when these records were produced should suffice
5 to make the 902(13) portion of the
6 authentication.

7 THE COURT: Basically, you're relying on
8 the first disclosure to actually show that the
9 records were authentic, and then in regard to
10 the electronic upgrade to 11 and 13, she can
11 testify about or she has by certification
12 testified that this appears according to her own
13 knowledge of how things work valid.

14 MS. SAVNER: Yes.

15 THE COURT: And she can't look at the
16 records because the records have been seized,
17 but based upon her experience that should be
18 enough. Question is whether that requires a
19 hearing. And where does she live? Florida?

20 MS. SAVNER: I don't know. She's certainly
21 not local to Vermont.

22 THE COURT: There's some connection to the
23 Netherlands.

24 MS. SAVNER: Yes. I believe she is in the
25 United States. I don't know where -- she is in

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1 Texas.

2 THE COURT: Okay.

3 MS. SAVNER: So I hear the defense's
4 argument which is that she in fact did not go
5 back and look at the records on the server,
6 but --

7 THE COURT: But she can't do that.

8 MS. SAVNER: She can't do that. And if we
9 brought her up here to testify, she would
10 testify that yeah, she can't do that, but she
11 knows how the business works.

12 THE COURT: Okay.

13 MS. SAVNER: And I don't think that's being
14 contested at this point. So I don't see the
15 need for a hearing.

16 THE COURT: Okay. So I suggest counsel get
17 together and figure whether or not we need a
18 hearing. If the defense is objecting to the
19 introduction of those records, we need a hearing
20 which means either that she has to come here or
21 that she has to be available by video, but there
22 has to be a hearing because, obviously, I mean,
23 the records come in anyway because that was
24 valid. Anyway.

25 Do you think that we need a hearing? If

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1 you're going to object to the introduction of
2 the records, do you think we need a hearing?

3 MS. SEN: Your Honor, I need to consider
4 it. I don't know that we necessarily do, but I
5 need to consult with Mr. Kaplan and my client.

6 THE COURT: Okay. So this is going to be
7 obviously under consideration. So I'd ask that
8 both sides get together. Do we need a hearing.
9 If we do need a hearing, we need to get this
10 moving quickly so that it is completed before
11 jury selection. All right?

12 MS. SEN: Thank you, your Honor.

13 THE COURT: Okay. I don't know if you need
14 a hearing or not, but this needs to get resolved
15 quickly.

16 MS. SAVNER: I would just note that, I
17 mean, obviously, we can give defense counsel
18 time to think about the issues, but they have no
19 objection to the first set of certifications and
20 their only objection to the second set is that,
21 the only additional value of the second
22 certification is that the witness, the records
23 custodian's testimony or statement under penalty
24 of perjury that she's familiar with how the
25 system operated and it was functioning at all

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1 times Backpage was in operation and during the
2 time the subpoenas were responded to. So unless
3 defense counsel can sort of proffer some
4 information that they want to seek from this
5 hearing, we would ask that to be the requirement
6 for setting a hearing as opposed to just an
7 additional burden for the government.

8 THE COURT: What you're looking for is a
9 ruling from the court that you do not have to
10 actually have access to the records to be able
11 to confirm what you know to be the truth when
12 you are an employee. Okay. No, I understand
13 that. So I'd ask to know whether we're going to
14 have a hearing in this because we need to set
15 that up.

16 MS. SAVNER: Okay. I can get into the
17 specific issues as to the specific Backpage ads
18 and the remedy of the lack of access to the
19 defense's lack of access to Backpage records at
20 this point if you'd like.

21 THE COURT: Yes.

22 MS. SAVNER: In terms of the defense's
23 request, again, they said that it contains
24 potentially material that's exculpatory without
25 identifying what's exculpatory, and I would just

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1 note that it is this prosecution team's position
2 that these Backpage records are not in the
3 possession of the prosecution team. I mean,
4 they are at this point seized and held by the
5 FBI, but for purposes of this sort of analysis
6 that the prosecution team is not considered to
7 be the United States --

8 THE COURT: Are you in communication with
9 the FBI that controls these particular, controls
10 access to these particular records?

11 MS. SAVNER: So if your Honor has it, we
12 have the, I attached along with the motion or
13 with the response to the motion the
14 communications that I have had with the sort of
15 formal system that those who are in possession
16 of the Backpage service have set up, and that's
17 attached as Exhibit B to the government's
18 response.

19 There was a point in the end of January of
20 this year where an internal email was sent to
21 DOJ staff saying that in order to obtain
22 historical information from Backpage, email the
23 request to a certain address and include all
24 available identifiers, and the sort of cover to
25 that email was FBI is triaging responses to

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1 accommodate only law enforcement requests. So
2 if a defendant in one of your cases wants to
3 obtain historical Backpage information, your law
4 enforcement agent will need to submit the
5 request on his or her behalf, including the
6 pertinent information.

7 So based on that information that the FBI
8 was now triaging requests for this information,
9 I followed and provided the email address listed
10 and followed the procedure listed and forwarded
11 along the previous defense subpoena and didn't
12 get any substantive response back. We've had
13 this, this is the same, the nature of the
14 communications between us and the keepers of
15 Backpage servers are the same as those of the
16 defense counsel has had at this point which is
17 well, we're sort of starting to search through
18 them, but there's been no actual substantive
19 response to the request that we've submitted on
20 the defense's behalf or obviously to the
21 defense's own request.

22 They've specifically said that the defense
23 noted that they're looking, when they heard back
24 from Mr. Bubb who is like General Counsel for
25 the FBI, I believe, he asked for a more pared

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1 down and sort of specific set of records that
2 they are looking for, and they sent, forwarded
3 along a letter requesting information as to
4 specific phone numbers. We don't, this
5 prosecution team doesn't know how that
6 information would be exculpatory. We don't know
7 the defense's theory about it. If we --

8 THE COURT: But you know exactly what the
9 defense is asking for.

10 MS. SAVNER: Yes.

11 THE COURT: Would it be helpful to have the
12 court issue an order requiring them to conduct
13 this particular investigation?

14 MS. SAVNER: I mean, that was what the
15 subpoena was, and they responded with the
16 affidavit saying that they weren't able to
17 complete the request at this time. They're not,
18 you know, a party to this case. So I don't know
19 the practicalities of issuing them an order
20 aside from another subpoena which they're not
21 responding to at this time, it appears.

22 So in terms of a remedy to this issue, one,
23 you know, that I don't believe that the defense
24 has identified any clearly exculpatory material
25 or even potentially exculpatory material to the

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1 extent that they believe there are Backpage
2 records on the servers that show that the women
3 who are charged victims were prostituted from
4 some other IP addresses. You know, if we could
5 get more information from them, from the
6 defense, we could discuss it.

7 But based on the government's theory of the
8 case, that wouldn't be exculpatory. First, you
9 know, it isn't our supposition that the
10 defendant was sitting at his home computer, you
11 know, day and night posting ads from one
12 location which would be the relevance of an IP
13 address analysis, you know. He had multiple
14 mobile devices where he could have and likely
15 did post on Backpage or check Backpage ads, but
16 also the witnesses will explain that they too at
17 times posted their own ads under the defendant's
18 permission and under their, under his direction,
19 but they also used their own phones or
20 electronic devices to post ads on occasion, too.
21 So I don't know the relevance of any IP
22 addresses that would be associated. I mean,
23 maybe they're relevant, but they're not
24 necessarily exculpatory what IP addresses were
25 used as the witnesses will say that ads were

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1 posted from all over and not just in any IP
2 address that can be specifically linked to the
3 defendant and his residence.

4 THE COURT: Okay. So I guess it's
5 obviously speculative as to whether anything is
6 going to be exculpatory, but this is the FBI. I
7 mean, I would think they'd be able to run the
8 check here. Would it be helpful to have a
9 hearing with the lawyer for the FBI calling in
10 and explaining why they have not responded to
11 this subpoena or -- well?

12 MS. SAVNER: Again, I don't believe it's
13 necessary. I mean, either they, it seems from
14 their various representations that they're
15 working on a system to make these records
16 accessible and have been since the day the
17 servers were seized, and they don't have it up
18 and running yet sufficient to be able to comply
19 with these requests. I mean, we can follow up
20 and see if there's any update.

21 THE COURT: So can you follow up? Because
22 I think if there's not some progress here, then
23 we have to make a decision as to whether or not
24 we have a hearing and try to find out what
25 progress can be made.

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1 MS. SAVNER: Yes. I would just note that
2 the only remedy that the defense seeks in its
3 motion is the preclusion of the government's
4 properly subpoenaed and disclosed Backpage ads.
5 So to the extent that that is an unjustified
6 remedy given the circumstances, which I believe
7 it is, I don't see where a hearing would get us,
8 right? Either the records are accessible or
9 not, and obviously if they are, then the defense
10 requests should be responded to, but the remedy
11 sought is the exclusion of the government's
12 records --

13 THE COURT: Well, right. That's what I
14 brought up with Ms. Sen. Are there other
15 remedies which are less dramatic.

16 MS. SAVNER: And I don't know if we've had
17 these communications directly with this set of
18 defense counsel, but we've discussed with the
19 prior defense counsel there was certain
20 information that they were seeking, facts that
21 they wanted to corroborate through ads, if they
22 proposed it to us we could discuss potential
23 stipulations after consulting with the witnesses
24 and determining from their perspective the
25 veracity of the claims of any sort of Backpage

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1 ads were being posted from "X" location or "Y"
2 location, but again, I don't have the specifics
3 of what the defense -- exculpatory --

4 THE COURT: What I suggest is both sides
5 meet here again, and come up with either with
6 other remedies, but more than that, come up with
7 a joint proposal of going to the FBI and seeing
8 exactly what the status is at this point, and if
9 it's not progressing, then perhaps talk about
10 whether we're going to have a hearing and ask
11 counsel for the FBI to explore exactly what the
12 status is of those records and whether in fact
13 there's a remedy that, whether they in fact are,
14 could come across the records that are being
15 sought.

16 MS. SAVNER: We will confer with defense
17 counsel.

18 THE COURT: I appreciate the fact this is a
19 dramatic remedy that the defense is requesting.
20 Wipe out all the records on Backpage. That is
21 not likely. But I'm also really perplexed as to
22 why they can't comply with what the defense is
23 requesting. It doesn't seem that warranted. So
24 anyway, if you can all meet and consult and then
25 if we need a hearing, then let me know how that

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1 would work. Okay.

2 MS. SAVNER: Thank you.

3 THE COURT: So it's now ten after. Can we
4 start at quarter after 1, and we have left 533
5 and 539 and then also I've gotten a list from
6 the parties about things that they want to
7 address. Is that all we have left today?

8 MR. KAPLAN: I believe so, Judge.

9 MR. DARROW: I believe so. I'm just
10 wondering about a list. Did you receive a list
11 from --

12 THE COURT: It was on the bench. It's
13 outstanding issues April 10, 2019. Topics.
14 There's nine topics listed.

15 (Discussion at the bench between
16 Clerk Muir and Judge Sessions)

17 THE COURT: This is not a list that you
18 have. Joanne wrote out a list of nine topics
19 that were to be covered at today's hearing after
20 the last hearing.

21 MR. DARROW: Thank you.

22 THE COURT: So maybe we should show you
23 that list and tell us whether in fact we need to
24 address all of these. Okay? So we'll be back
25 at quarter after 1.

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1 (Lunch recess taken 12:12 - 1:20 p.m.)

2 THE COURT: Good afternoon. All right.
3 This is a continuation of the hearing that
4 started this morning. What's left is 359.
5 That's the Defendant's Motion in Limine to
6 exclude certain statements, documents and other
7 evidence. Mr. Darrow, you're not, you're not
8 the defense, are you?

9 MR. DARROW: I'm not, and I apologize, but
10 there was a logistical matter I want to bring to
11 your attention.

12 THE COURT: Oh, all right.

13 MR. DARROW: Mr. Grady is scheduled to meet
14 one of the government's witnesses at 2 and we
15 wanted to suggest if it was okay with the court
16 that the court perhaps take the matters that
17 he's been designated to handle at the front.

18 THE COURT: That's fine. All I've got left
19 is 359 and some of those have already been
20 talked about.

21 MR. DARROW: Right.

22 THE COURT: There's not much left.

23 MR. DARROW: The motion to sever count 15.
24 Is that on the schedule?

25 THE COURT: No. That was not on the

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1 schedule. I guess that I was not aware of that.

2 MR. DARROW: If you wanted to hear our
3 argument on it, that was one thing that the
4 government thought we'd chat about.

5 THE COURT: Okay.

6 MR. DARROW: And then of perhaps lesser
7 note, the issue of summary charts, and then
8 lastly there were three things, the last one was
9 one of the witnesses whom the government has
10 been referring to as a victim witness, we
11 received a letter from her -- I can't remember
12 if it was a psychologist or psychiatrist --
13 going on in some detail about her deficits and
14 suggesting that perhaps some accommodations
15 could be made while she was testifying and
16 Mr. Grady was going to address that as well.

17 THE COURT: All right. Do you have any
18 objections to Mr. Grady going first?

19 MS. SEN: No, your Honor.

20 THE COURT: Okay.

21 MR. GRADY: Thank you, your Honor, and I
22 think I'll start with the two matters that seems
23 like there's some agreement with the defense.
24 The first being the summary charts. We provided
25 the summary charts to the defense, and I believe

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1 today was the day for any objections that they
2 had to those summary charts, and they have
3 indicated they do not have any objections to
4 that. So seems to be that matter is resolved.
5 Exactly, your Honor.

6 The second thing as far as the
7 accommodation, it is by Victim C. So what I'll
8 do is I'll provide the court the letter from her
9 psychiatrist. I have met with Victim C and
10 after meeting with her in preparation for this
11 trial, I do not believe that she will need all
12 the accommodations that are listed in here.
13 Some of them wouldn't apply anyway because one
14 of them is not have someone sit behind her at
15 the witness chair, and of course, there will not
16 be anybody behind the witness chair and things
17 of that nature. So I'll just provide this for
18 the court's background. I believe this was
19 provided to Judge Crawford, but I don't believe
20 it has been provided to your Honor yet. And
21 again, the only accommodation that she may need
22 is if there is a particular traumatic event and
23 she needs a break, certainly, and ask for a
24 break, I'm sure the court would accommodate her
25 appropriately.

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1 THE COURT: Yes.

2 MR. GRADY: So I'll leave that, and I've
3 spoken with the defense and they were just
4 curious as to what if any accommodations we were
5 seeking, and again, we're not seeking any of the
6 accommodations in here at this time.

7 THE COURT: Okay.

8 MR. GRADY: And then finally, your Honor,
9 as to severing Count 15. I believe that is
10 still an issue. One of defense motions argue
11 that it was ripe for the court to review, and
12 they also submitted a supplemental case filing
13 talking about this Davis case. And so briefly,
14 we believe that joinder of Count 15 with the
15 other counts is proper because it arises from
16 the same series of transactions, and as far as
17 the date is concerned, Count 15 overlaps with
18 not only Count 10, Count 11, but also Count 16
19 which is the Travel Act violation as well.

20 Davis is a different situation. In that
21 case, 12 years went in between the different
22 charged trafficking or Mann Act violations, and
23 again, we do not have such a gap in this case.
24 In fact, there is no gap time-wise because Count
25 15 goes along the same dates as Count 10 and

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1 Count 11. So because they --

2 THE COURT: And if 15 were severed, that
3 would require duplication of evidence almost
4 exclusively.

5 MR. GRADY: Exactly, your Honor, because
6 we'll have the same issue of calling law
7 enforcement who seized the defendant's hard
8 drive. We'll have the same witness to talk
9 about the forensic analysis of the hard drive.
10 Same witness will talk about yes, I was there
11 when this photography session occurred, et
12 cetera. So it would be, we'd have to duplicate
13 significant portions of the trial. So again,
14 for economy purposes it makes sense to have them
15 joined, and there's no miscarriage of justice
16 that would result which of course is the
17 standard to have severance under Rule 8, I
18 believe it is.

19 THE COURT: Okay.

20 MR. GRADY: Thank you, your Honor.

21 THE COURT: Okay. First of all, defense
22 want to respond to that argument?

23 MS. SEN: Yes, your Honor.

24 THE COURT: And then we'll take you right
25 into 359 as well.

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1 MS. SEN: Thank you, your Honor.

2 THE COURT: So the summary charts are okay?

3 MS. SEN: Yes, your Honor.

4 THE COURT: And severance?

5 MS. SEN: Well, your Honor, prior counsel
6 had filed a motion to sever, and in all honesty
7 I had overlooked the Davis case so that's why I
8 had filed it out of time, but I think that the
9 prior counsel had made a little bit different
10 than the argument about, I would like to focus
11 more on the prejudice of trying that count
12 together with the others because one of the
13 issues with that count, that count is based on
14 an act that took place on one day between May I
15 think 17th and 18th of 2013. The basis for that
16 count is one photo. The details and
17 circumstances surrounding that photo are in
18 dispute, to say the least. The person who is
19 the focus of that photo is not here to talk
20 about the circumstances of that photo, and while
21 there may be others, that whole count relies on
22 one piece of evidence related to one witness who
23 is dead.

24 Not only that, this witness is charged as
25 the count the government is referring to as the

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1 minor, and that count carries of course a
2 mandatory minimum penalty if our client is
3 convicted of it. Given the stakes, what's at
4 stake with that particular count, your Honor --

5 THE COURT: What's the mandatory minimum?

6 MS. SEN: 15 years. And your Honor, the
7 other point with that is that I understand
8 there's no big time gap because according to the
9 government all of this activity was occurring
10 during that time, but what's interesting about
11 that count, it's based on what is purportedly an
12 advertisement, but as the government's response
13 points out, advertising the minor for this
14 purpose was not illegal at the time. And the
15 argument that the government is making with
16 respect to the women who were the focus of
17 Counts 10 to 14 all involve coercive sort of via
18 advertising and posting.

19 So the concern is how is the jury going to
20 separate out sort of the coercive element
21 because this is, of course, a strict liability
22 count where the government doesn't have to prove
23 coercion with respect to one photo of someone
24 who isn't here to speak about the circumstances,
25 and our own belief about that photo is very

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1 different from the government using that as sort
2 of the basis to argue that this person was
3 prostituted.

4 You know, there's no evidence in this case,
5 quite honestly, your Honor, showing that this
6 woman prostituted. There's no question that,
7 well, there may be some question as to whether
8 she was involved in drug activity related to the
9 charges here, but there's nothing that
10 definitively comes in to state that this woman
11 was prostituted or prostituted herself for that
12 matter. In fact, there may be evidence that she
13 did, but that would not be related to our
14 client.

15 So the idea that this count which is so,
16 it's just, to try it together with the other
17 counts I think is going to create so much
18 prejudice and so much confusion with respect to
19 how you charge the jury with this because the
20 very activity that the government is basing the
21 count on is something that actually wasn't
22 illegal at the time, but the government is
23 arguing that it doesn't have to show that it
24 advertised this person but that this is yet some
25 evidence that our client prostituted this

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1 person, but advertising the person for
2 prostitution wasn't illegal.

3 I think it just creates tremendous
4 confusion, and I think it would be tremendously
5 prejudicial to try all these counts together. I
6 understand that there's an element of
7 duplicative evidence that would be involved were
8 the count to be severed, but I think the
9 prejudice and the potential risk of very severe
10 penalties to our client is significantly
11 concerning that it should be severed.

12 THE COURT: Well, I mean, double-edged
13 sword, isn't it? I mean, you request severance.
14 That means that if the jury came back after
15 considering Counts 1 through 14 and 16 and
16 acquit the defendant, then the government has a
17 second chance and, using the same evidence, go
18 through it again. So in that situation, who's
19 harmed? In fact, you're prejudiced by severing
20 the two.

21 More than that, if you say that you're
22 prejudiced because of the confusion about
23 intention, the coercion, et cetera, you don't
24 have to show coercion at Count 15, if there is
25 confusion about Count 15 and in terms of

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1 coercion there may be confusion about that, and
2 people may think you have to prove coercion,
3 then essentially the government is being
4 prejudiced by having them all together.

5 So I mean, I don't mean to put myself in
6 the position of advocates trying to figure out
7 who is prejudiced by one form or another, but
8 the fact is you might also be prejudiced by
9 severance really. You think that could be true?

10 MS. SEN: Well, I don't know, your Honor.
11 I think if we got an acquittal on all counts, I
12 would wonder if the government would put the
13 jury through another trial on the last count.
14 So it's hard for me to sort of imagine that
15 scenario at this point. I certainly see the
16 court's point, but I still --

17 THE COURT: How about the confusion? I
18 mean, you've got, in Counts 10 through 14 you've
19 got a really rigorous element. They've got to
20 prove coercion, et cetera, and it does seem that
21 it would be confusing in regard to Count 15, but
22 that confusion, I guess to some extent, is to
23 your benefit because people would start to think
24 oh, my goodness, you've got to have coercion in
25 regard to this one photograph taken earlier. I

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1 don't know. I mean, it just, it seems to me
2 that the prejudice may go both ways.

3 MS. SEN: I'll leave it to the court.

4 THE COURT: All right. Okay.

5 MS. SEN: With respect to our motion to
6 exclude various pieces of evidence.

7 THE COURT: Yes.

8 MS. SEN: I'll just start with, I'll just
9 go through them, your Honor.

10 THE COURT: Okay.

11 MS. SEN: The first is the assault of --

12 THE COURT: Kaitlynn Charbonneau.

13 MS. SEN: Yes, your Honor.

14 THE COURT: Right.

15 MS. SEN: In New York City, and I still
16 don't understand how this is relevant. The
17 government is proffering that she's going to
18 testify that she was prostituting for our
19 client, but there's no, and the government
20 admits there's no evidence that he was aware of
21 it or directed it.

22 THE COURT: There's no question she's, as I
23 understand it from the pleadings, and obviously
24 you know better than I, but she's down in New
25 York, she's being a prostitute. She's working

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1 technically for the defendant, she says. She's
2 assaulted by this customer, but the reason that
3 is relevant is it explains why she quit. One of
4 the questions that jurors may have during the
5 course of the trial is why would she quit, and
6 this explains why she quit. She got assaulted
7 by somebody else, and that's the answer to the
8 question why would she not quit, et cetera.
9 Anyway, it explains that last decision. And
10 tell me if you think that's irrelevant.

11 MS. SEN: I do at some level, your Honor,
12 because the question is whether our client
13 coerced her into prostituting. I think our
14 client would dispute that she was even
15 prostituting for him, but if that's what she
16 says, even taking what she says at face value,
17 our client obviously, I just don't understand
18 how arguing that he coerced her into
19 prostituting has anything to with her being
20 independently unknown to our client assaulted by
21 someone.

22 THE COURT: That's not the relevance. The
23 relevance is her decision to quit.

24 MS. SEN: But again, in the big picture of
25 things, her decision whether or not she

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1 continued or she quit, I mean my understanding
2 of the facts here is that she also met someone
3 else and decided to have a relationship with
4 them, and that's part of also why she left. So
5 the idea that this is sort of the defining
6 moment. I mean, it doesn't seem to me that the
7 evidence reads that way, your Honor. Seems like
8 there were many factors that contributed to why
9 she left. That may have been one of them, but
10 the fact, it's very prejudicial evidence, your
11 Honor, and I think it has very tangential
12 relevance.

13 THE COURT: Again, it's how you interpret
14 it. It could very well be evidence which is
15 helpful for you. I mean, the fact is, she would
16 testify that she quit, and apparently, she would
17 not testify to any ramifications as a result of
18 her quitting which is the opposite of coercion.
19 So to some extent, that evidence may be helpful
20 to you. Am I wrong about that?

21 MS. SEN: I don't know about that, your
22 Honor. I don't see that as being helpful to my
23 client in the broader picture.

24 THE COURT: Well, it shows that she has the
25 free will to quit and that there were no

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1 ramifications as a result of that, and you don't
2 think that you'd use that on cross-examination?

3 MS. SEN: Well, I also think that the
4 government can use it to argue about how our
5 client created this situation where she got, I
6 mean, I think the reason the government wants to
7 use it is for this argument that sort of because
8 our client got this woman into prostitution,
9 this is one of the horrible things that happened
10 to her. So I think it has a very negative
11 overall impact.

12 I would also note, your Honor, that the
13 government just disclosed to us last Friday that
14 this particular witness lied to the grand jury
15 under oath about her activities in prostitution
16 and other things. So to the extent that we're
17 relying on the accuracy of this information, I
18 think it's a little bit concerning because the
19 government has already told us that this woman
20 has lied under oath.

21 THE COURT: Tell me. Is she one of the
22 subjects of the 10 to 14?

23 MS. SEN: Yes, your Honor.

24 THE COURT: All right. Well, I don't mean
25 to debate your evidence, but anyway. Okay.

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1 So the next thing is statements of Keisha
2 Willard. Government doesn't intend to use
3 those? Is that right?

4 MS. SEN: Yes, your Honor.

5 THE COURT: Okay. Then statements of Ms.
6 Lang?

7 MS. SEN: Again, I think that the timing of
8 these statements is important. We have sort of
9 these vague general statements about -- and the
10 statements are hearsay statements. I think Ms.
11 Lang is saying that she's heard from other
12 people that our client uses these photos to
13 blackmail people. I mean, A, it's hearsay. B,
14 I'm not clear in terms of the timing. So, for
15 example, the issue with the posting of that
16 video of Ms. Ackley, which was in March, you
17 know, the government is saying oh, everybody
18 knew about that video and everyone was concerned
19 about it except that all of the charges were for
20 the time period before that.

21 You know, I think without more detail about
22 these sorts of statements, they're just vague
23 statements, and they're entirely hearsay. So to
24 that extent we would ask that --

25 THE COURT: Just as a matter of sort of

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1 principle, I agree with you. I think that if
2 the government seeks to introduce all of these
3 hearsay statements, speculative statements,
4 under the theory that it creates a reasonable
5 fear on the part of these witnesses, then I
6 think that's a slippery slope, and it seems to
7 me in light of what the government has said the
8 evidence they have, that's a slippery slope that
9 you don't have to slide down.

10 If you have evidence of direct observations
11 of violence, I want to say to you that I believe
12 the government can introduce that as a general
13 matter. Anything related to violence which can
14 create fear from the person who observed it is
15 relevant and extremely important, and that gets
16 diminished by evidence that gee, I heard from
17 this person that he was abusing women, I just
18 think -- and they seek to do this, introduce
19 this, because that's what the reasonable fear is
20 that the state of mind of the victims, and I
21 just think that's mistaken in this context.

22 So as a general matter I think there's
23 probably I should say a couple of things as to
24 my approach having read all of this stuff that
25 you've submitted. I think the government is

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1 going to able to introduce testimony in regard
2 to violence, demeaning nature of his activities
3 in regard to women because it creates that fear,
4 and it's direct. I think that when there's a
5 reliance upon hearsay which is used to explain
6 why they fear the defendant, I think that will
7 be excluded as a general matter, and I think
8 that you generally would be able to look into
9 prostitution convictions, although I've just
10 started exploring this Rivera case, and I don't
11 know what the limits of the Rivera case are, I
12 think that's really an interesting question.

13 If somebody is engaged in prostitution,
14 they have a knowledge of prostitution, they have
15 a knowledge of the business, as it were, which
16 they talk about in Rivera, but I think it's much
17 more likely that they would be less subject to
18 coercion than a person who has not been involved
19 in prostitution.

20 So therefore, perhaps I disagree with the
21 Second Circuit. If the Second Circuit made a
22 blanket rule or did they say in this particular
23 circumstance the Sixth Amendment right of
24 confrontation was not violated during the
25 cross-examination but in other circumstances it

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1 may be violative? Or does the court have
2 discretion in any way to permit that area of
3 cross-examination as an evidentiary question? I
4 think there's just a lot to think about in that
5 decision.

6 Okay. So I'm extemporanizing, but I think
7 perhaps the best thing coming out of this
8 hearing is for you to get a sense of this is
9 what's likely to happen. I mean, all this
10 violence is likely to come in or all this
11 demeaning behavior in regard to woman because
12 that took previous to coercion is likely to come
13 in. Also I think you should be accorded the
14 opportunity to explore past prostitution,
15 although I have to figure this out in terms of
16 whether -- okay. That's what I've learned about
17 the way I would approach this at this point.

18 MS. SEN: Thank you, your Honor.

19 THE COURT: Is there any questions about
20 that?

21 MS. SEN: No. I think that was very clear,
22 your Honor. I think we have a couple of more
23 issues.

24 THE COURT: Yes.

25 MS. SEN: One of these issues of these

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1 phone calls between a witness named Chrissy
2 Tatro and a codefendant.

3 THE COURT: So that's -- okay, yes.

4 MS. SEN: So I've listened to these phone
5 calls, your Honor, and they are calls made by
6 Ms. Tatro at the behest with law enforcement,
7 and the nature of these calls is basically
8 trying to convince Mr. McFarlan that she is not
9 cooperating with law enforcement. Obviously,
10 she is. So the entire nature of the discussion
11 here is about I'll get you my paperwork. Show
12 me your paperwork. I don't believe you.
13 There's a lot of drama. You know, she tells
14 them that her grandmother is in the hospital, I
15 mean, all kinds of things.

16 There is nothing here in these calls that I
17 have heard that involves a conspiracy to
18 distribute drugs. I mean, these are calls,
19 controlled calls made with law enforcement.
20 They don't, they're not setting up a controlled
21 buy. They're not talking about the drugs
22 themselves except for very peripherally.

23 The only call, I know that the government
24 represents that at one point there's a call
25 where Mr. Folks can be heard and there's some

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1 acknowledgment of his stake in the drug
2 business, but I have not seen that call. It may
3 very well be that I have not, I've overlooked
4 it, but in what I have reviewed, I haven't seen
5 that phone call.

6 The one phone call I have seen is Ms. Tatro
7 calling my client, and at the very outset of
8 that call my client says to her, why are you
9 calling me? This has nothing to do with me.
10 This was between you and Mr. McFarlan. And she
11 says because I want your help, I want you to
12 talk to him for me, and my client says I'll talk
13 to him for you, but this has nothing to do with
14 me. So and even that conversation, I don't see
15 how it involves conspiracy to distribute drugs.
16 So we would request that those calls be
17 excluded.

18 THE COURT: So can I ask you about
19 801(d)(2)(E), scope of the conspiracy, and I
20 don't know the answer to that. I wish the, all
21 the statements among coconspirators in
22 furtherance of the conspiracy aren't admitted
23 under the conspiracy exception. What about
24 calls by an informant at the direction of the
25 government or law enforcement to a member of the

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1 conspiracy when in fact that statement that that
2 member of the conspiracy makes is to be used
3 against all the other coconspirators. Certainly
4 it could be used against Mr. McFarlan as an
5 admission, right? But is that the exception
6 under 801(d)(2)(E)? Is that in furtherance of
7 the conspiracy when in fact one of the parties
8 is the government?

9 MS. SEN: Well, your Honor, I would say, I
10 mean --

11 THE COURT: I just don't know the answer to
12 the question.

13 MS. SEN: I think that the recorded calls
14 from the CIs often come in under that exception
15 because they're actually purchasing drugs, but
16 what I am sort of arguing is a little different
17 point here. The purpose of that call was not in
18 furtherance of the conspiracy.

19 THE COURT: Then it wouldn't be admissible.

20 MS. SEN: Right. I mean, I don't see how
21 they're furthering the conspiracy. They were
22 conversations between people who are
23 coconspirators, but I don't think they had
24 anything to do with furthering this conspiracy,
25 and I think there is a burning question when you

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1 have codefendants whose statements are coming in
2 against each other, and I'd have to go back and
3 look. I know there is some case law on, your
4 Honor, on this issue of if a statement were to
5 come in in the course of the conspiracy where
6 the codefendant is not testifying, and there's a
7 possible issue with respect to the confrontation
8 clause issues that comes in, but I'm not sure
9 that that was where the court wanted to go, but
10 I am aware that there is some concern, for
11 example, if Mr. McFarlan were not going to
12 testify and then have his statements come in, if
13 there are statements different from these
14 related to the conspiracy, does that implicate
15 some confrontation clause issues, but that
16 isn't, I'm not arguing that here at all.

17 THE COURT: That's not exactly the point.

18 MS. SEN: No.

19 THE COURT: The question is is the
20 exception to the hearsay rule for statements of
21 co-conspirators, actually it's not your cite,
22 but when it's prompted by the government. Could
23 that be, is that really a statement in
24 furtherance of the conspiracy. I mean, I don't
25 know the answer to the question. That's, it

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1 certainly would not be a conspiracy exception in
2 regard to Mr. McFarlan because that's an
3 admission. But it becomes a confrontation, it
4 becomes a conspiracy question when you try to
5 apply the statements that Mr. McFarlan makes in
6 the phone call to the cooperating witness
7 against other people, and I just don't know the
8 answer to the question. Of course, Mr. McFarlan
9 probably, well, I don't know. He's going to be
10 testifying. So I don't know if he would be able
11 to make statements in regard to what was said in
12 that phone call but anyway.

13 So do you have an opinion as to whether the
14 801(d)(2)(E) applies in situations in which a
15 cooperating individual calls a member of the
16 conspiracy against the other members of the
17 conspiracy?

18 MS. SEN: I would argue it should be kept
19 out, your Honor.

20 THE COURT: Oh, really? The deductive
21 logic was great. Okay. All right.

22 MS. SEN: That would be my position.

23 THE COURT: I'll ask for the government's
24 response later. Okay.

25 MS. SEN: I think the court has been clear

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1 on how it would handle evidence of assaults.
2 That was the general issue that we brought up.

3 THE COURT: Yes. Okay. So we've already
4 resolved how the deaths are going to be handled.
5 People agree to that instruction. The assaults
6 are taken care of.

7 Drug activity related to the coconspiracy,
8 I think that that's also covered by our
9 discussion with regard to drug activity prior to
10 the beginning of the drug conspiracy. That's
11 all related to coercion in sections for Counts
12 10 through 14.

13 The Fruit Loops cereal box. Government now
14 says that the drugs were kept in the Fruit Loops
15 box.

16 MS. SEN: And our argument is that those
17 drugs were not related to our client. That Mr.
18 McFarlan and Ms. Tatro were involved in their
19 own conspiracy to distribute. Our client wasn't
20 aware of that box. So the idea that that would
21 be attributed to him, it shouldn't be.

22 THE COURT: Mr. McFarlan is going to
23 testify that that is all related to your client
24 as a much larger conspiracy, and that they had
25 coordinated efforts to go to New York and

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1 select, pick up drugs, et cetera. So Mr.
2 McFarlan according to the government will
3 testify that it's a much broader conspiracy and
4 that your client was a part of it. You may have
5 a defense to that. But as least as far as them
6 introducing evidence, they should be able to do
7 that.

8 MS. SEN: Okay.

9 THE COURT: Sexually explicit photographs?

10 MS. SEN: That is an issue I would like to
11 address, your Honor.

12 THE COURT: Okay.

13 MS. SEN: So one of, the category I'm
14 really thinking about is that in addition to the
15 women who are Counts 10 to 15, there are, as my
16 motion states, probably about ten more
17 witnesses, and there are loads of pictures of
18 those witnesses, and it is unclear how any of
19 photos related to those women are related in any
20 way to showing that our client forced the women
21 who are named in Counts 10 to 15 into
22 prostitution.

23 I mean, these are just pictures, and the
24 government's response, it seems to be on the one
25 hand they're arguing that they want to offer

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1 those photos because they're going to
2 authenticate other photos using them or devices
3 and that just, I don't quite understand it.

4 THE COURT: I thought the government's
5 response was they wanted to be able to show,
6 they want to be able to link the defendant to
7 the actual devices that were used, but that's
8 less significant than the scenario that I would
9 imagine. So you have, let's say, a nonincluded
10 witness in 10 through, I guess, 15 or 14.
11 Right? So somebody else. You say there's ten
12 other people. Are those ten others going to
13 testify?

14 MS. SEN: They are on the government's
15 witness list, your Honor.

16 THE COURT: Okay. Let's just assume that
17 they testify, and they say embarrassing
18 photographs were taken of me, and I know that or
19 he said that he would use them if ever I
20 violated his rules. Would you then not be able
21 to introduce the photographs to show exactly why
22 she feels the way she does?

23 MS. SEN: But how does that go to prove
24 that anybody else was forced, your Honor? I
25 mean, this is sort of the flip side of 412.

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1 Because under FRE 412, the government is saying
2 you can't talk about any of these women's past
3 acts of prostitution, that they prostituted for
4 anyone else, I mean that's sort of the
5 government's, what it's offering. The court is
6 obviously within the bounds of Rivera, and we'll
7 have a discussion about that.

8 But generally, the government's position is
9 for those witnesses you can't really go into
10 much beyond the fact to provide some context of
11 how they met the defendant. Okay.

12 How is what our client did with any, this
13 isn't conspiracy for human trafficking. These
14 are individual counts that our client coerced
15 these women in Counts 10 to 14 to prostitute.
16 How he, you know, what any other woman says
17 about what he did, I don't understand how that
18 would possibly be relevant to showing that he
19 coerced or forced someone else, a specific
20 person to engage in prostitution.

21 You know, time period? You know, these are
22 all over the map. They're from all kinds of
23 time periods. Some of these women didn't know
24 each other, some of them did, but I just don't
25 understand all these photographs. I mean, it's

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1 one thing theoretically, let's say, it's one
2 thing that Witness A says I saw Witness B, I saw
3 this and I observed that. But how is a photo of
4 Witness A relevant to anything about Witness B?

5 THE COURT: Well, I would suppose the
6 government would say this establishes a pattern
7 of activity which then leads to a conclusion
8 about coercion. What they're basically saying
9 is that there's three approaches to coercion.
10 One of them is to take an embarrassing
11 photograph, a compromising photograph of women,
12 and then using them to coerce involvement in
13 prostitution. Okay?

14 So if a witness who is not listed in the
15 indictment but can testify that she, number one,
16 had embarrassing photographs taken; number two,
17 he confronted her with saying if you don't obey
18 me in terms of cooperating with my business,
19 then I'm going to disclose all of this to the
20 public which is going to embarrass you. And so
21 they establish a pattern of threats, and they
22 use not only the 10 through 14 but they also use
23 other people who are working, but not charged,
24 to show the same pattern of activity. That's
25 the relevance of it. If they can show that

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1 similar approach to both people in 10 through 14
2 and also people who just generally work in his
3 business. That's the relevance. The question
4 is whether or not it's overly prejudicial, but
5 that's the relevance, I think.

6 MS. SEN: Well, your Honor, I read the
7 element of a pattern, I mean, is it that the
8 government is allowed to bring in as many
9 witnesses as it wants to establish that pattern
10 or does it have to be limited in some way and
11 one way is a pattern with respect to each
12 particular witness.

13 THE COURT: They're trying to establish the
14 existence of this modus operandi, right? So why
15 should they be limited, you know, unless
16 duplication becomes an issue, but generally why
17 should they be limited in proving the modus
18 operandi that was used by the defendant arguably
19 to just people who were in the indictment? Why
20 can't they include what happened to everybody
21 within the business?

22 MS. SEN: Well, I mean, I think with
23 respect to each witness I think if there's a
24 different reason, your Honor, and I think that
25 part of this to me it seems like this should be

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1 really a 404(B) issue at some level.

2 THE COURT: Could be a 404(B) issue as
3 well.

4 MS. SEN: And the fact is that the timing
5 of these photos and when they were taken and if
6 there's really a pattern with respect to,
7 because the timing in all of these is so
8 different and these women were prostituting as
9 alleged in the indictment at very different
10 times, all of that is going to become relevant.
11 I mean, it may be that we have to, you know, a
12 lot of these photographs, I mean, I've seen what
13 the government at least in its last exhibit list
14 had offered as exhibits with respect to the
15 other witnesses.

16 You know, a lot of these photos are, for
17 example, selfie photos. So they're photos the
18 women themselves took and then sent to our
19 client, loads and loads of those from all the
20 women in this case. There are all kinds of
21 photos that it's quite clear from forensic
22 evidence, for example, that our client
23 downloaded from other websites on the internet
24 that were freely and publicly available.

25 So there's, I mean, it may be that we wind

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1 up having to just challenge the introduction of
2 each photograph as it comes in.

3 THE COURT: Well, it's a fairly
4 straightforward question. If the government can
5 establish, number one, that this person is a
6 part of the prostitution business; number two,
7 this person had photographs taken of them or
8 within the possession of the defendant; and
9 number 3, that the defendant theoretically
10 coerced them into doing what he wanted them to
11 do by threatening, directly or indirectly,
12 threatening to reveal those to the public, that
13 doesn't take a whole lot of evidence.

14 But that's the pattern, that's the pattern
15 that they're trying to establish, and just as a
16 general principle, the more they can show that,
17 the more reliable it is. The more victims,
18 theoretically. I don't know. That, I'm
19 speculating as to whether the government is
20 approaching this issue this way, but that's, I
21 think that's what they want to show is that
22 everybody had these photographs in his
23 possession, and that he was using that as a
24 coercive tool to get them to work and do things
25 that he wanted them to do. And why is that not

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1 totally relevant even if they're not subject to
2 a count in the indictment?

3 MS. SEN: Well, your Honor, based on the
4 evidence that we've seen to date, I'm not sure
5 that they can meet that standard for those
6 photographs. It may be that we have to take
7 that out.

8 THE COURT: As a general principle, it
9 seems, I think that's the issue. We'll find out
10 from the government whether that's exactly what
11 the issue is. And then obviously as we get into
12 trial, if there's some nuance here that oh, this
13 person was never threatened or this person
14 didn't have an image or whatever, then we can
15 address that.

16 MS. SEN: I think the only other issue left
17 to talk about are the videos, and I think we've
18 talked about that already.

19 THE COURT: You want me to watch all the
20 videos.

21 MS. SEN: That's what we're requesting,
22 your Honor.

23 THE COURT: Right. Okay. So for the
24 government?

25 MR. DARROW: Your Honor, may Mr. Grady

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1 address the motion to sever if you want more on
2 that, and also as to the motion in limine the
3 last part of it that talked about the photos is
4 within his charge.

5 THE COURT: All right. Mr. Grady. I don't
6 think you need to respond, well, you can respond
7 on the sever.

8 MR. GRADY: Unless you need anything
9 further, your Honor, I'm not planning on
10 mentioning anything more about the motion to
11 sever.

12 As far as the photos, I would also just
13 point out that they also are relevant for a
14 couple different points as well in addition to
15 what you just discussed with defense counsel.
16 One point being for Count 15 to the extent that
17 there are photos in the defendant's hard drive
18 that are also showing up in either Backpage
19 returns or Backpage screenshots found on the
20 defendant's hard drive as well, those are
21 relevant to Count 15 and shows that he was
22 involved in violating the Travel Act by using
23 the internet for prostitution activity.

24 So we would also point out that part of the
25 photos are relevant for that reason and also

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1 they also corroborate different witness
2 accounts. So one witness I'm thinking of will
3 talk about how the defendant required her to
4 allow him to take pictures of her buttocks in
5 order to get a cigarette. So the fact that such
6 photographs were found in the hard drive also go
7 to corroborating the victim, and again, showing
8 examples of how he would demean and control his
9 drug --

10 THE COURT: So you are going to call a
11 number of women who are part of this activity
12 who are not the subject of the indictment.

13 MR. GRADY: That's correct, your Honor, and
14 so for a couple of reasons. One of them goes to
15 they have observations about charge victims.
16 Also they have conduct that would help us prove
17 the ITA count which is Count 16. If I said
18 Count 15, I misspoke, but Court 16 is the Travel
19 Act account that they have observations and
20 photographs that help the government prove that
21 aspect of the indictment.

22 THE COURT: Okay. But will they testify
23 that, one, they were a part of the activity;
24 two, that they had embarrassing photographs or
25 sexually related photographs taken of them;

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1 third, that they were confronted by the
2 defendant and the defendant threatened use of
3 those photographs if they violated any of his
4 directions?

5 MR. GRADY: As to the reputational harm you
6 just mentioned, your Honor, my recollection is
7 that it would be a subset of the ones that we
8 call if they do, in fact, did experience that it
9 would just be a small portion of that. In other
10 words, it's not going to be all of the ones.
11 We're actually narrowing down our list anyway to
12 streamline for trial. So I don't imagine, I
13 can't think of one right now that will exactly
14 say that, but of course, that's why we're
15 conducting trial prep, and certainly if that is
16 the case, then that would be relevant to
17 reputational harm experienced by the charge
18 victims.

19 THE COURT: Right, but you're trying to
20 show a pattern of activity on the part of the
21 defendant, are you not?

22 MR. GRADY: Yes, your Honor.

23 THE COURT: Right? So these particular
24 witnesses are being offered to show or to
25 corroborate that pattern of activity?

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1 MR. GRADY: In one aspect, yes, to the
2 extent that they experience that with the
3 defendant as far as threats to release photos
4 for reputational harm certainly, and I just want
5 to point out that it does go to Travel Act if
6 there are pictures that are directly found in
7 Backpage advertisements as well. So there's
8 dual usage to the photos in addition to just the
9 reputational.

10 THE COURT: In addition to what they have
11 observed in regard to his treatment of others.

12 MR. GRADY: Exactly. Correct.

13 THE COURT: All right. Who is going to
14 respond to the other issues?

15 MR. DARROW: Fortunately for me, there's
16 not a lot left, your Honor, when we take in the
17 videos and the photos, but briefly, you know,
18 your Honor, we think you have a bead on the
19 issue of the young woman who was engaged as a,
20 working as a prostitute for Mr. Folks in
21 Vermont. At some point I think a concern for
22 all of them was Vermont's kind of a small town,
23 and this can get, particularly for women who
24 grew up here and went to school here and have a
25 lot of family here, this reputational harm is a

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1 problem. This one was concerned about word
2 getting out because she'd been in the business
3 for a while, and she was placed with Mr., she
4 will testify that she was placed with
5 Mr. Folks's mother in New York, and she'll tell
6 the story that we proffered in our pleading, and
7 at the end of the day, as you point out, the
8 ultimate relevance is the time when she said
9 this is it for me.

10 THE COURT: Why is that relevant? Why do
11 you want to get in the fact that she quit the
12 business?

13 MR. DARROW: We think it's mostly
14 significant because it's her story. It shows
15 the trajectory of her experience in the world of
16 Folks and prostitution, and we think it's
17 relevant because she says this is why I stopped,
18 and that was it for me, and I did meet a fellow
19 and then I quit using drugs, too. And I don't
20 do those things anymore. So I think it's just a
21 way that she explains what happened to her, and
22 she'll start, you know, I met Mr. Folks when
23 thus and such happened, and these are my
24 experiences along the road, and then I was down
25 in New York and then that happened and I was

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1 out.

2 THE COURT: Do you have any evidence to
3 suggest that the defendant reacted in a
4 particular way to her voluntary termination of
5 involvement?

6 MR. DARROW: Not that I know of. I didn't
7 ask her that. I think that's an interesting
8 question because as you brought up there's a
9 double-edged sword there, but our sense was that
10 there's probative value to her telling her story
11 and how she got out, and if you weigh it under
12 403, it's not substantially outweighed by
13 prejudicial value because she's not going to say
14 that she was being assaulted at the direction of
15 the defendant. She's just going to say, well, I
16 was working, this happened one night. I was
17 doing the thing I've done hundreds of times
18 before, but you know, I got out when this
19 happened. So I don't think it's that
20 prejudicial, particularly when there will also
21 be testimony from others about actual assaults
22 by the defendant so why --

23 THE COURT: I mean, I suppose it is
24 prejudicial to the extent that it suggests that
25 this is a violent activity or could lead to

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1 violence and the defendant put her in this
2 position but, regardless, double-edged sword.

3 MR. DARROW: With that instance and with a
4 couple subjects we're going to discuss next,
5 some or one of the complaints of the defense is
6 they don't see how this is tied to how there's
7 an evidentiary connection to the defendant, and
8 we'd like the opportunity to make that
9 connection at trial, and if we fail to do so,
10 they can raise the objections then.

11 And then briefly, on the phone call issue.
12 Both Chrissy, the drug worker who ended up
13 cooperating and who's on one end of the phone
14 and Donald McFarlan, the codefendant in the drug
15 conspiracy, will testify. The call that was of
16 particular interest, and it's been provided to
17 counsel and maybe we can point it out to her if
18 she's having trouble finding it, but it's one of
19 the calls where at the direction of her law
20 enforcement handlers Chrissy is explaining what
21 happened to the drugs because the back story is
22 and McFarlan will testify that since the summer
23 of 2015, he's been the fellow who brings drugs
24 from his home in New York up to Folks in
25 Burlington, Vermont, where the Folks

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1 organization will distribute them. He comes up
2 every so often, few weeks, every month or so,
3 stays for a few days, is paid for the drugs,
4 goes back to New York.

5 On what would ultimately turn out to be the
6 last trip up in January 2016 he's coming up with
7 a bulk package with a significant amount of
8 heroin, crack cocaine and some other stuff, and
9 that stuff ends up getting seized because he
10 puts it in a cereal box and has Chrissy hold it.
11 Chrissy previously had been a trusted drug
12 worker.

13 As it turned out, Chrissy at that point had
14 been entered into a cooperation relationship so
15 she contacts her law enforcement people and says
16 I have a box of drugs here, and they come over
17 and get it, and then the problem of course is
18 what is Chrissy going to say about the fact that
19 a lot of valuable drugs have disappeared, and
20 the ruse is the police came and got them, and I
21 got cited.

22 So she calls McFarlan with that story and
23 the call that we think has particular
24 evidentiary value for the defendant's
25 statements, not Chrissy or McFarlane's, is when

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1 she calls McFarlan, he's with the defendant.
2 The defendant after a little while takes the
3 phone and intervenes and starts jumping in and
4 saying this is what we're going to do. That's
5 why we want it in there.

6 Now, the last call sometime later as
7 Counsel indicated, Chrissy calls Folks again and
8 he says what are you talking about? I don't
9 know anything about it, and that's, we're
10 putting that in to be fair because he did say
11 that, but that's that earlier call where the
12 call to MacFarlane and Folks takes the phone.

13 THE COURT: This is not an 801(d)(2)(E)
14 question because you've got a statement right
15 from the defendant. That's an admission.

16 MR. DARROW: Exactly. Correct.

17 THE COURT: So it's not in furtherance of
18 the conspiracy. That becomes, I guess that
19 becomes essentially irrelevant.

20 MR. DARROW: Well, I mean, it sounds like
21 an admission of an opposing party, but it's, I
22 mean, MacFarland and Folks are in a conspiracy
23 to move drugs from New York to Vermont and
24 distribute them, and some of those drugs which
25 came up as part of that conspiracy have

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1 disappeared, and they're talking about what to
2 do. So maybe it's both.

3 THE COURT: Right. Okay. I was not aware
4 that Mr. Folks had actually taken the phone
5 and --

6 MR. DARROW: It's what he says is what
7 we're interested in.

8 THE COURT: Right. So you're not taking
9 what Mr. McFarlan says about the fact that he
10 was working with Mr. Folks in this call as
11 evidence. You're using directly his statements,
12 and that's different. Okay.

13 MR. DARROW: Any other piece of that motion
14 in limine you want --

15 THE COURT: No.

16 MR. DARROW: Thanks, Judge.

17 MR. KAPLAN: I think this discussion about
18 the witness who said she was in New York and she
19 was beaten and she quit, I don't really have a
20 problem with that, but I think it does open the
21 door because our understanding is that after
22 that she went back to working as a prostitute,
23 and that she's now in Vermont and has been doing
24 that back and forth since 2016. So I mean, I
25 would put the government on notice if she's

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1 going to come in and testify that she quit that
2 we're going to be able to, of course, with the
3 court's approval, to cross-examine her on the
4 fact that she didn't quit. That she's still
5 doing it. Not with our client but with others.

6 THE COURT: Well, you certainly would be
7 able to do that.

8 MR. KAPLAN: Right.

9 THE COURT: If she makes a statement that
10 says she quit and explains exactly why, and then
11 you have evidence to suggest that she's not
12 telling the truth, you certainly would be able
13 to cross-examine her on that.

14 MR. KAPLAN: The other issue, Judge, is I'm
15 a little confused about the discussion between
16 the videos and the demeaning conduct. As I
17 understand, the court is going to review the
18 videos and is that to see if they're relevant,
19 and if the court thinks they're relevant,
20 whether they're overly prejudicial? My stance
21 would be if they're not relevant, then it
22 wouldn't be appropriate for the witnesses to
23 talk about it.

24 THE COURT: If they're not relevant, if the
25 videos are not relevant?

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1 MR. KAPLAN: Not relevant, because they
2 don't show coercion or they don't show demeaning
3 conduct. And the other thing is what we might
4 consider demeaning people in the video might not
5 consider demeaning or it might not bother them.

6 THE COURT: You can ask a witness certainly
7 about how they were treated. Demeaning,
8 coerced, et cetera. Forget the video. They
9 certainly have the opportunity to say to these
10 witnesses, you know, what did he do, how did he
11 treat you, and what did it mean to you. I mean,
12 that's, isn't that pretty straightforward? I
13 mean the problem with the video is that it tends
14 to be, it can be prejudicial.

15 MR. KAPLAN: The problem is if a witness
16 takes the stand and starts talking about how
17 that was demeaning to her, and she didn't want
18 to do it and on and on, we're going to be forced
19 to play the video because the video is going to
20 show something different in our opinion, and we
21 wanted to keep the video out because we thought
22 it was overly prejudicial, but of course, we'd
23 be in a situation, I think, of being forced to
24 play it at that point.

25 THE COURT: Don't you think it's pretty

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1 clear that the women, whether they're in Counts
2 1 or 10 through 14, were the women who are part
3 of this, who were testifying about coercion in
4 general, don't you think they'd be allowed to
5 explain exactly what they mean by coercion?
6 That is, they were demeaned and threatened with
7 reputational harm or et cetera, whatever they
8 say.

9 MR. KAPLAN: But it's not what the videos
10 show, I guess is my point.

11 THE COURT: It's not what?

12 MR. KAPLAN: It's not what the videos will
13 show.

14 THE COURT: Then I guess we'd be in a
15 situation of you having to use the videos to
16 contradict the testimony of these witnesses.
17 But the government's got to prove -- this is
18 pretty straightforward and you know it. The
19 government has to prove coercion, and to prove
20 coercion they can call these witnesses to
21 describe the defendant's statements and that is
22 being used to show coercion. So they've got to
23 have leeway to be able to show what the
24 defendant said and what he acted and what he did
25 to make them feel they were coerced into

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1 participating in this prostitution activity. So
2 they're going to get quite a bit of leeway to do
3 that.

4 MR. KAPLAN: I don't really disagree with
5 that. I'm just concerned, I don't think that
6 video really is great for anyone. It's not
7 something the jurors are going to enjoy
8 watching, at least most of them, I would think.

9 THE COURT: But I do, you know, I do think
10 that the government should be able to ask
11 witnesses what happened and you should be able
12 to cross-examine and you make the decision as to
13 whether --

14 MR. KAPLAN: I understand. Okay.

15 MR. DARROW: I apologize. I know it's been
16 a long day, but can I --

17 THE COURT: No. It's okay. It's only
18 2:30.

19 MR. DARROW: On these videos, you're going
20 to get a CD from us which will probably have all
21 of them on it. There are five. There are three
22 associated with the urination, and there are two
23 associated with the walnut.

24 THE COURT: I thought there were two
25 associated with urination.

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1 MR. DARROW: There are three.

2 THE COURT: One was a different, discussion
3 about urination.

4 MR. DARROW: Yes.

5 THE COURT: And the two were the actual
6 urination.

7 MR. DARROW: Exactly. So as to, on the
8 urination side, there's the video which the
9 defendant appears to have taken of himself, but
10 in any event, he's in it saying what he's about
11 to do, you know, we're going to have, I'm going
12 to do this. And then there are two videos of
13 him doing that. As to those two videos, one of
14 the young women is a trafficking victim and the
15 other is a drug worker.

16 Now, so let's just talk about the universe
17 of videos. So those are the three videos;
18 introductory and two actuals on the urination.

19 On the walnut challenge, the evidence
20 indicates that there were three young women who
21 participated in that. Two of them are charged
22 trafficking victims and one is a deceased woman
23 who acted as a prostitute but is not a charged
24 trafficking victim.

25 As to the two trafficking victims, the

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1 government does not have those videos. The
2 evidence is that it happened, it was videotaped,
3 the witnesses obviously remember it. It's very
4 hard for them to talk about, but we don't have
5 those videos. One of the possible reasons is a
6 couple of the digital devices that were seized
7 we've been unable to access notwithstanding a
8 search warrant because they're encrypted, and we
9 just can't get into them.

10 So there's one, the videos that we do have
11 concern the noncharged woman acting as a
12 prostitute is now dead, and those two videos do
13 not show the actual pornographic act. They are
14 just introductory by nature, sort of like the
15 introductory urinating video. In those two
16 videos they're preparing for this to happen, and
17 Folks is saying what he's about to do.

18 Now, I think probably what, one of the
19 reasons why the defense has repeatedly indicated
20 that there's not a lot of evidence of coercion
21 on the videos is that you'll see a lot of
22 giggling and chuckling going on, and as we've
23 argued, we don't think that necessarily means
24 the situation wasn't coercive. I mean, the
25 now-deceased woman who is preparing for the

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1 walnut challenge isn't protesting, and in one of
2 the actual urination videos, the girl who is a
3 drug worker is giggling.

4 Now, she will testify, I think, that she'd
5 just been, used a sample of some new heroin, and
6 it was very hot, and she said it blew her away,
7 and she got in the shower, and next thing she
8 knew the defendant was urinating on her, and she
9 said I was completely out of it which is why I
10 was laughing. But needless to say, looking back
11 on it, she doesn't consider it a laughing
12 matter.

13 So I wanted you to understand what the
14 videos, the five total that are coming to you
15 are, and then you will see giggling and --

16 THE COURT: Well, no, I appreciate that,
17 and I think the point that you made was these
18 are addicts. They're offered \$500 to
19 participate if they, I guess, win, and driven by
20 their addiction and the thought of money.

21 MR. DARROW: Exactly.

22 THE COURT: Your argument is that's
23 coercion. That's using their illness to coerce
24 their behavior. No, I appreciate it.

25 MR. DARROW: Okay.

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1 THE COURT: I appreciate there can be mixed
2 signals there.

3 MR. DARROW: All right. Thank you, Judge.

4 THE COURT: Okay. So that I think that's
5 it for the motions. Now, is there anything else
6 that we need to talk about at this point?

7 MR. DARROW: We wanted to mention a couple
8 things. When we were last together, you gave
9 the defense until today, April 4th, to file any
10 objections they might have to Judge Crawford's
11 instructions. So we're assuming that the
12 defense is good with that. In conversations
13 with the defense regarding the transcripts
14 associated with the videos and video and audio
15 recordings, we're informed that the accuracy of
16 the transcripts won't be contested, although the
17 defense said they may want to play more of the
18 videos than we had proposed, but the transcripts
19 won't be a problem.

20 We mentioned last time the parties will be
21 stipulating as to the felony possession count
22 about the prior conviction for a gentleman in
23 prison, not to exceed one year, we hope to get
24 that filed some time soon. May I have a moment?

25 THE COURT: Yes.

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1 MR. DARROW: The last thing we wanted to
2 bring to your attention is when we were before
3 you back in March there was a motion and some
4 discussion regarding whether the cocospirator
5 statements by Mandy who was involved in the four
6 undercover drug buys could come in. Mandy will
7 be a witness, but at the time she was a runner
8 for the defendant, and when the four drug buys
9 take place in January and February 2016, they're
10 set up by the CS calling Mr. Folks and he tells
11 them, you know, park in thus and such a place,
12 and the CS, and Mandy comes out of the crack
13 house and delivers the drugs. They're, in a
14 couple of cases, I think, they're delivered
15 inside, but in each case Mandy is the
16 intermediary between Mr. Folks and the
17 cooperator in the drugs distribution. She's the
18 one that actually hands the drugs over and takes
19 the money, and we had hoped to play the audio of
20 those undercover buys before Mandy testifies.
21 So the government was concerned that the audio
22 including Mandy's statements would be
23 admissible, and we wanted to ensure that you had
24 that in mind.

25 THE COURT: All right.

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1 MR. DARROW: Thank you.

2 THE COURT: Mr. Kaplan?

3 MR. KAPLAN: I mean, as long as they can
4 link that up, I don't think we're going to
5 object.

6 THE COURT: As long as they have a good
7 faith basis to believe they're going to be able
8 to get that testimony in, they can use that in
9 advance.

10 MR. KAPLAN: Yes.

11 THE COURT: All right. Okay. Is there
12 anything else that you think we have to address
13 at this point?

14 MR. KAPLAN: I don't think so, Judge.
15 Anything else? I don't think so, Judge. Thank
16 you.

17 THE COURT: All right. So you'll submit
18 this exhibit with five films, and I'm going to
19 study the various motions. You'll get an order
20 in writing, but I think that I've made myself
21 pretty clear about the general approach to the
22 case, I think. I think the government should be
23 able to prove coercion and will be given leeway
24 to do that just that. I mean, obviously within
25 boundaries. And also, you know, the defense

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1 certainly can cross-examine witnesses about
2 previous experience, and I just want to research
3 this Rivera case to see what its limits and
4 restrictions are. Okay? All right. Thank you.

5 (Hearing ended at 2:30 p.m.)
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C E R T I F I C A T E

I, Cynthia Foster, Registered Professional Reporter, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

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